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**In the United States Court of Appeals
for the Ninth Circuit**

ROBERT W. MORGAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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In the United States Court of Appeals for the Ninth Circuit

No. 17245

ROBERT W. MORGAN, APPELLANT

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

OPINION BELOW

No opinion was written by the District Court in connection with the original proceedings. On May 17, 1965, the District Court filed a memorandum opinion denying appellant's petition for a writ of habeas corpus but modifying the sentence under Rule 35. This opinion is included in the Supplemental Record filed in this Court on June 4, 1965.

JURISDICTION

This is an appeal from a judgment of conviction for using a false document, in violation of 18 U.S.C., Section 1001 and for theft by false pretenses, and conversion, of a Treasury check for \$441.11, in violation of 18 U.S.C., Section 641, as charged in Counts I and II, respectively, of an indictment returned in the Northern District of California, Southern Division, on September 21, 1960. The subject matter of these counts was appellant's 1955 income tax return and the refund check issued thereon.

After a jury trial which began on November 7, 1960, appellant was found guilty on Counts I and II, and on December 22, 1960, was sentenced to the following sentence (1 R. —): ¹

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count ONE and FIVE (5) YEARS on Count TWO. These sentences shall run concurrently with each other and consecutively to any period of actual confinement under the sentence or sentences of imprisonment now being served, by the defendant in the California State Prison, and will commence at the expiration of such confinement by any parole or release from such confinement, conditional or otherwise. This sentence however is imposed under Title 18 U.S.C. Section 4208(a)(2) and the defendant will be eligible for parole at any time.

A modification of sentence entered on May 17, 1965 by the District Court added the following language to the sentence (1 R. —):

Nothing in this judgment is intended to contravene the provisions of 18 U.S.C. Section 3568.

Notice of Appeal was filed on December 22, 1960. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the Northern District of California, Southern Division, was a proper district in which to lay venue and to prosecute appellant for "using" a false document, in violation of 18 U.S.C., Section 1001, and for theft by false pretenses of the tax refund check, where the proof showed that appellant's 1955

¹ Volume No. 1 of the initial 13-volume record filed in this Court is not paginated and will be referred to simply as Volume No. 1 (1 R.—). Volumes II to XIII, inclusive, are reporters' transcript of pretrial and trial proceedings and will be referred to by volume and page, e.g., 3 R. 5. Supplemental records certified to this Court will be referred to by date and page, e.g., 1 Supp. R. 22 (filed on September 22, 1960).

tax return was mailed in the Northern District of California, at Folsom Prison and filed with the District Director of Internal Revenue at San Francisco, and that the tax refund check was issued at San Francisco, and mailed to appellant at Folsom Prison and thereafter transmitted by him through the mail to Los Angeles, California, where at his request, it was endorsed and deposited in the account of an attorney who thereafter remitted \$200 of the proceeds back to appellant at Folsom Prison. (Covering appellant's assigned errors 1 and 10, Br. 4-9, 48.)

2. Whether denial of a continuance beyond November 7, 1960, was an abuse of discretion. (App. No. II, Br. 9-17.)

3. Whether the proof is sufficient to sustain the verdict that appellant was guilty of filing a 1955 tax return which falsely represented the taxpayer's Social Security number, the wages earned, the taxes withheld, his marital state, and the rightful number of exemptions. (Reply to App. Nos. III and VIII Br. 18-19, 46.)

4. Whether denial of appellant's motion to quash Government exhibits in the form of two letters by appellant to a Los Angeles attorney transmitting his tax refund check and giving instructions as to its disposition (Pltf. Exs. 7 and 11), was an abuse of discretion, or denied appellant the protection of the attorney-client privilege (App. Nos. IV and VI, Br. 20-24, 36-41).

5. Whether production of appellant by the warden of Folsom Prison, where appellant was then serving an uncompleted sentence for state offenses, to the United States District Court under a writ of habeas corpus ad prosequendam for the purpose of prosecution on the pending federal indictment, worked a termination of the state sentence. (App. No. V, Br. 25-35.)

6. Whether the District Court erroneously denied a mistrial demanded by appellant on the ground of prejudice allegedly resulting from entry of a guilty plea by co-defendant Davenport, which was entered out of the presence of the jury. (App. No. VII, Br. 42-45.)

7. Whether due process has been denied to appellant because of the length of time in which this appeal has been pending. (App. No. IX, Br. 47.)

STATUTES INVOLVED**18 U.S.C.:****SEC. 641. Public money, property or records.**

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

SEC. 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

STATEMENT**1. The allegations of the indictment**

In this indictment of 12 counts (1 R. —) appellant was the sole defendant named in Counts I and II. He was also tried on Counts III and VI, upon which the jury were unable to agree and which were dismissed on February 6, 1961. Appellant was charged jointly with co-defendant Davenport in Counts III and

IV, and with co-defendant Escarrega in Count IX and with co-defendant Holley in Count XII. Defendant Davenport was the sole defendant in Counts VII and VIII. Defendants Escarrega and Holley were the sole defendants named in Counts X and XII, respectively. Counts IX, X, XI and XII were severed on November 7, 1960, and at that time, the case proceeded to trial as to appellant and co-defendant Davenport on Counts I to VIII, inclusive. Davenport entered a plea of guilty to Count VII on November 9, 1960, and the trial continued thereafter with appellant, the sole defendant on trial.

All defendants named in the indictment were California State Prison inmates at the time of the offenses alleged.

Count I charged that on or about March 11, 1956, appellant, at San Francisco, in the Northern District of California, knowingly and willfully used a false document in a matter within the jurisdiction of the United States Treasury Department. This document was an income tax return alleged to contain knowingly false statements that appellant had received \$2,150.50 in wages from one Lowell Lyons, Jr., in 1955, that \$473.11 in taxes had been withheld therefrom, and that he was entitled to three exemptions, in violation of 18 U.S.C., Section 1001.

Count II charged that in reliance upon these same false representations, the Treasury Department issued appellant a tax refund check of \$441.11 which appellant, by such false pretenses, did steal and convert during the period March 11, 1956 to September 11, 1956, in San Francisco, and at Folsom, California, in violation of 18 U.S.C., Section 641.

Count III charged appellant and co-defendant Davenport with conspiring with each other and certain other named co-conspirators to defraud the United States of America and commit offenses revolving around preparation and filing of false withholding statements and tax returns for various prison inmates. The jury disagreed on this count, which charged a violation of 18 U.S.C., Section 371.

Count IV charged appellant and co-defendant Davenport with another conspiracy involving tax returns in the names of two inmates not specified in Count III, in violation of 18 U.S.C., Section 371. This Count was dismissed on motion on November 21, 1960.

Counts V and VI charged appellant in relation to false tax refund claims submitted in the names of one Nelson, and one Hayes, respectively, both in violation of 18 U.S.C., Sections 2 and 287. Count V was dismissed on November 28, 1960, and the jury disagreed on Count VI.

Counts VII and VIII charged only Davenport, alias King, with offenses relating to tax returns of inmate Hayes (Count VII) and of himself, filed under the name W. H. Reith (Count VIII). Davenport pleaded guilty to Count VII on November 9, 1960, and thereafter, appeared as a witness for appellant. (10 R. 983.)

Count IX charged appellant and Escarrega with a Section 371 conspiracy with each other and others named as co-conspirators, but not defendants, in relation to Escarrega's 1957 tax return, and Count X charged Escarrega with the theft by false pretenses of the tax refund check issued on his 1957 return. Counts IX and X were severed for trial and Escarrega was acquitted on December 8, 1960, after a separate jury trial in which appellant was not a party.

Counts XI and XII charged appellant and Holley, in the pattern of Counts IX and X, in relation to Holley's 1957 return, and Holley was also acquitted after a jury trial with Escarrega.

2. Pre-trial proceedings

Pretrial motions and motions for discovery and continuance will be reviewed and discussed in the context of argument thereon in this brief.

3. The evidence in support of the verdict ²

Plaintiff's Exhibit 1 in this case is an income tax return Form 1040A for 1955, filled out in the name of Robert E. Morgan,

² This statement is confined to evidence relating directly to Counts I and II, and does not encompass evidence relating to Counts III and VI, which consisted chiefly of (1) testimony of a former Folsom inmate, Everette Nelson, as to appellant's activities in preparing false returns for other prisoners (7 R. 387), (2) expert handwriting opinion that appellant signed a return filed in the name of another prisoner, Hayes (9 R. 777-778), testimony that in 1960, appellant proposed a false return scheme to a fellow jail prisoner in Los Angeles, and said he had previously engaged in such transactions at Folsom Prison. (Steinhoff, 8 R. 623.)

P.O. Box A-33442, Represa, California. Appellant's prison number was A33442. (Exs. 63, 64, 65.) Represa, California, is the return address for the mail of all prisoners at Folsom Prison, who list their prison number as a box number on their mail. (11 R. 1153.)

Exhibit No. 1 was filed with and processed by the District Director of Internal Revenue at San Francisco, California, according to the testimony of the supervisor of the returns. Index and Service Unit of that office (Smith, 5 R. 143) and of the Returns Coordinator of that office (Conrad, 11 R. 1157), although appellant in his testimony stated he had mailed it to Los Angeles, from Folsom Prison (10 R. 1011). Internal Revenue Service regulations require that all tax returns bearing the home address of "Represa, California," are to be filed in the San Francisco District Director's office. (11 R. 1152.)³ This return was assigned the processing number R166332, which is the number thereafter placed on, and only on, the refund check related to that return. (5 R. 144, 150; 11 R. 1151.)

Exhibit No. 2 is a United States Treasury check for \$444.11 showing the serial number R166332, dated May 29, 1956, and issued at San Francisco, to Robert E and Goldye Morgan, P.O. Box A-33442, Represa [*sic*], Cal. It bears endorsements

³ "SEC. 6091. PLACE FOR FILING RETURNS OR OTHER DOCUMENTS.

"(a) *General Rule*.—When not otherwise provided for by this title, the Secretary or his delegate shall by regulations prescribe the place for the filing of any return, declaration, statement, or other document, or copies thereof, required by this title or by regulations.

"(b) *Tax Returns*.—In the case of returns of tax required under authority of part II of this subchapter—

(1) "*Persons other than corporations*.—

"(A) *General rule*.—Except as provided in subparagraph (B), a return (other than a corporation return) shall be made to the Secretary or his delegate—

"(i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or

* * * *

"(B) *Exception*.—Returns of—

"(i) persons who have no legal residence or principal place of business in any internal revenue district."

* * * *

(26 U.S.C. 1964 ed., Sec. 6091.)

"Robert E. Morgan," "Goldye Morgan," and "Wilber Littlefield," and was deposited on September 11, 1956, in a Los Angeles bank. This tax refund check was issued at San Francisco, and is related by the number R166332 to Exhibit No. 1. (5 R. 144, 153; 11 R. 1156.) Appellant testified that he "would say" he received Exhibit No. 2 from filing Exhibit No. 1, and that he mailed Exhibit No. 2 to one of his Los Angeles attorneys, Wilber Littlefield. (10 R. 1012.)

Wilber Littlefield testified that during the period 1954 to 1956, he had advised appellant about a writ of habeas corpus, and about appeal procedures, but that he had nothing to do with appellant's 1955 tax return (6 R. 206) and rendered no legal services to appellant concerning the latter's rights to the \$444.11 check (6 R. 205). Littlefield produced Exhibit No. 7 (6 R. 162) which is a letter dated August 7, 1956, from appellant to Littlefield, enclosing Exhibit No. 2, stating that his wife, Goldye, would be visiting a Mrs. Bertha Warner in September, and instructing Littlefield to deliver the check to Mrs. Warner for the purpose of getting the endorsement of Goldye.

Exhibit No. 11, also produced by Littlefield (6 R. 195) is another letter by appellant to Littlefield dated August 28, 1956, enclosing a copy of appellant's letter of instruction to Mrs. Warner, telling Littlefield to release the check to Mrs. Warner, and stating Littlefield is to receive \$200 of the proceeds for his "retainer." Littlefield testified that he received Exhibit No. 11 from appellant (6 R. 225) and thereafter delivered the check to Arthur Warner, and within 24 hours, the check was returned to his office with the endorsement of "Goldeye Morgan" (6 R. 226, 241). Littlefield then deposited the check in his bank account, issued a \$244.11 check to Arthur Warner, and retained \$200, which he subsequently sent to appellant at Box A-33442, Represa, California (6 R. 221), and which appellant testified he did receive (11 R. 1091).

Arthur Warner was called as a Government witness and on a voir dire examination held to inquire into his possible professional relations with appellant (8 R. 665-693), testified he was admitted to the Bars of New Jersey, the Supreme Court and the Ninth Circuit Court of Appeals, but never licensed to prac-

tice law in California, and that he had been retained by appellant to look into alleged violations of appellant's civil rights.

In jury proceedings, Warner testified that in August, 1956, he lived with his mother, Bertha Warner, in Los Angeles (8 R. 665) and that about August 28, 1956, a Government check for several hundred dollars and made out to Robert and Goldye Morgan was in his possession, but he did not know if it was Exhibit No. 2 (8 R. 729). He stated that Goldye Morgan did not spend the month of September, 1956, with them, that he had never seen her, and that he did not have Exhibit No. 2 endorsed with her name, or recognize the handwriting on the endorsement. (8 R. 734, 742, 744.) He mailed that check back to Littlefield, who in turn sent Warner a check for "several hundred dollars." (8 R. 730-731.) Warner retained a portion of the Littlefield check to cover a debt of \$50 to \$100, and sent payments to appellant in sums of \$15 or \$16 per month. (8 R. 731, 734.)

A handwriting expert testified that the "Robert Morgan" on the endorsement of Exhibit 2, as well as the signature on the tax return (Ex. 1), were written by appellant. (9 R. 767.)

Appellant's 1955 tax return (Ex. 1) was filled out in the name of Robert E. Morgan, Social Security No. 535-12-5229, claiming exemptions for himself a wife (Goldye Morgan), and for George Weisbart, represented to be an "uncle" who lived in taxpayer's home and who did not have a gross income of \$600 or more in 1955. The taxpayer listed \$2,150.50 in wages received from Lowell Lyons, Jr., 229 No. Broadway, Los Angeles and withheld income taxes of \$473.11.

Social Security No. 535-12-5229 is the number of one Roland Esperson, of Sumner, Washington, according to Exhibit No. 88. (12 R. 1166.) Appellant testified he could not recall if this number had been issued to him, but that he was not employed in Washington in 1955, and that he could not recall if his Social Security Number was 501-18-6307 in 1942, when he worked in Minnesota, for the St. Paul Packing and Fuel Company, his brother's business. (12 R. 1195-1196.)

Mrs. Goldye Michelson testified that she had not communicated with appellant during the period 1953 to 1960 (6 R. 192) and that she was divorced from him on December 10,

1953 (6 R. 186), as appears in Exhibit No. 10, a decree of the District Court of Gonzales County, Texas. She said her appearance as a witness was her first visit to California (6 R. 189) and she did not know a Mrs. Bertha Warner (6 R. 189). She was not supported by appellant in 1955. (6 R. 187.) She did not endorse Exhibit No. 2 and never saw it before. (6 R. 189.)

Appellant testified that when he listed himself as divorced on a prison form in July, 1955, he was not aware of the "legal aspect" of the divorce and that he was later informed by attorneys that he was still legally married to Goldye, and that he felt he was still married to her, because she committed a fraud on the court by misstatements as to service of process and appellant's whereabouts. (10 R. 1007-1008; 11 R. 1082-1083, 1087.) He testified that he had not seen or supported her since 1953 (11 R. 1074) and that he listed her on the joint return, because he assumed she was not going to file her own return when she did not answer his letter of inquiry whether she was going to do so (11 R. 1073-1075). He said he wrote attorney Littlefield that Goldye would visit Mrs. Warner for a month in order to assure Littlefield that the Warners were all right, and that this was a false statement to Littlefield. (11 R. 1088-1089.)

Mrs. Peggy Weisbart testified that in 1955, she was married to, lived with, and was supported by her husband, George Weisbart, who died in 1960. (6 R. 169-170.) He filed a tax return for 1955 (6 R. 170), which was admitted as Plaintiff's Exhibit No. 84 (11 R. 1140) and shows a reported income of \$1,473.95 from the Yellow Cab Company, and lists exemptions for himself, a wife and three children. At one time, Mrs. Weisbart's husband had worked for Lowell Lyons, Jr., 229 North Broadway, Los Angeles, and her husband had known appellant, who had written to her husband in 1955 or 1956, in envelopes which bore a return address of Robert Morgan, Represa, California. (6 R. 169, 171, 174.) One such letter contained a form to be filled out so that the prisoner could receive mail, but her husband threw this form away and did not execute it. (6 R. 174-175.)

Appellant testified as follows with respect to George Weisbart (10 R. 1010-1011):

*

*

*

*

*

Well, George Weisbart is a man who at one time was employed, up until, I think, 1955, with Mr. Lowell Lyons on special leg work, detailed investigation, etc., and he was a sick man. He was—I don't know how to phrase it—he was the hanger-on character, and so forth. He was a—he had a bad drinking habit and I used to take care of the man and I considered him on a relationship, such as an uncle, although he was not a blood uncle of mine, but it was a term that we commonly used.

I paid his rent sometimes at 1144 Cornwell with the lady that he was living with who represented herself as Mrs. George Weisbart. However, from both Mrs. Weisbart and Mr. Weisbart, they were never married. I took care of more than half of his income, his expenses, etc., and I thought that it was a legal liability to me to deduct him on my income tax. I did not know that he had died, though, until the other day, or I would have made an effort to bring him in myself as a witness.

Q. I see. Did you support Mr. Weisbart during the year of 1955?

A. Well, I'm sure that I supported him much, much more than is declared—shown by the statement. I am sure that it was more than half of his income.

* * * * *

On cross-examination, appellant testified that while he was held in the Los Angeles jail from January 25 to June 24, 1955, before being transferred to the Chino correctional institution (11 R. 1059, 1067), Weisbart worked for appellant as his legal runner (11 R. 1065), but that appellant filed no employer's withholding tax returns, because the relationship was simply "friendly" and not that of an employer-employee (11 R. 1066). Appellant said he gave Weisbart releases with which Weisbart obtained money for his personal family support from attorneys who, he testified, were holding the money for appellant. (11 R. 1059-1061, 1065.) Appellant acknowledged that when he was booked at the Los Angeles County Jail on January 25, 1955, after being returned from Texas, he had less than \$100 to his credit at the jail. (11 R. 1059.) On cross-examination, appellant stated that it was false for him to represent in the 1955 tax

return that Weisbart lived in appellant's home only "if paying the rent is false," that he reported Weisbart had gross income under \$600, because Weisbart told him he had no income, and that he felt his relationship with Weisbart justified his description of him on the tax return as "uncle." (11 R. 1068-1070.)

Lowell Lyons, Jr., 229 North Broadway, Los Angeles, was listed by appellant as his employer in 1955. (Ex. 1.) Mr. Lyons could not be found at the time of trial, despite a diligent search by the Intelligence Division of the Internal Revenue Service and by the United States Marshal. (11 R. 1158.) Exhibit 81 is a certificate of the District Director at Los Angeles, stating that no 1955 Employer's Quarterly Withholding Statement (Form No. 941), could be found for Lowell Lyons, Jr., at any address, and no such return could be found for 1953, 1954, 1955 or 1956. (11 R. 1138.) Mrs. Weisbart testified that her husband at one time worked for Mr. Lyons. (6 R. 170, 177.) Attorney Littlefield testified that Lowell Lyons, Jr., was in 1955, a Los Angeles attorney, and at one time an attorney for appellant. (6 R. 236.)

Los Angeles County Jail records (Ex. 78) showed that appellant was held there from January 25, 1955 until June 24, 1955, when he was released to the correctional institution at Chino, California, and that Lowell Lyons, Jr., was confined at the jail from April 11, 1955 to June 27, 1957. (6 R. 256-259.) California Department of Correction records (Ex. 63) show that appellant was received on June 24, 1955, and first paroled thereafter on May 4, 1959.

Appellant testified that \$2,150.50 was paid to him in cash by Lowell Lyons, Jr., between January 1 and January 15, 1955, at which time, appellant left Los Angeles, and drove to Houston, Texas, and that this payment was for services rendered to Lyons in 1954, which included some undefined services in connection with a real estate transaction and legal briefing work performed for Lyons while appellant was in jail. (10 R. 1009; 11 R. 1056-1058.) Appellant did not remember his 1954 tax return or recall if Lyons gave him a withholding statement for 1954. (11 R. 1057-1058.) He stated on direct examination that he did not list Lyons on the employment history form he filled out in prison, because he was actually self employed and

it was not good policy to list an employer who had a jail record. (10 R. 1042-1043; 11 R. 1079.)

Appellant testified on direct examination that a withholding statement (Form W-2), which showed \$473.11 withheld in taxes, was furnished to him by Mr. Lyons or his office. (10 R. 1009-1011.) On cross-examination, he stated he was not positive that he ever had a Form W-2 (11 R. 1191) and that he believes he did not have a Form W-2 (11 R. 1200), and that an entry in his prison mail record for an outgoing mail item addressed to the District Director at San Francisco on March 13, 1956, was a letter explaining the absence of a Form W-2 (10 R. 1011; 11 R. 1197, 1200-1201). He also testified his 1955 deductions would have procured his tax refund, but that the required "long form" tax return was not available at the prison. (11 R. 1075-1076.)

SUMMARY OF ARGUMENT

I

The evidence amply established that appellant's 1955 tax return was mailed to, received at and processed by the District Director of Internal Revenue at San Francisco and that a tax refund check was issued there and mailed to appellant, and venue was therefore established in the Northern District of California, Southern Division.

II

Denial of further continuance was no abuse of discretion, and did not cause prejudice to appellant.

III

The falsity of the 1955 return was amply established in that the jury reasonably could believe appellant did not receive \$2,150.50 in wages, that no taxes were withheld, and that he was not entitled to claim exemptions for a wife and an uncle.

IV

No attorney-client privilege attached to appellant's correspondence in which he instructed Los Angeles attorney Little-

field to procure endorsements on appellant's 1955 tax refund check, nor was appellant denied any right to pre-trial discovery and inspection of this correspondence.

V

Appellant's sentence was clearly intended to start after he served his California State Prison sentence and California did not relinquish its right to require completion of the state sentence by releasing appellant to the United States District Court for prosecution.

VI

Co-defendant Davenport's guilty plea did not prejudice appellant and he was not improperly denied severance.

VII

Appellant has not been prejudiced on appeal by deprivation of an adequate record.

ARGUMENT

I. Venue was established in the Northern District of California, Southern Division, and the jury were properly instructed on this topic

The facts recited clearly establish that taxpayer's return was filed and processed in San Francisco,⁴ and that the refund check was issued there and mailed to appellant at Folsom Prison, where he received it. Thus, the false document was "used" at San Francisco by appellant as charged in Count I of the indictment, which avoided the usual conjunctive charge that the document was "made and used" in violation of 18 U.S.C., Section 1001, for reasons best known to the draftsman, who

⁴ Although the representative of the San Francisco District Director could not testify whether Exhibit 1 was received by mail or personal delivery (6 R. 290-293), appellant testified that his 1955 tax return was mailed through the education office at Folsom Prison. (12 R. 1200-1201.) While appellant testified that he mailed Exhibit 1 to Los Angeles, an item of outgoing mail recorded in his prison mail register showed that on March 13, 1960, he mailed a communication to the District Director at San Francisco, which appellant explained was a "letter" explaining the absence of a Form W-2.

may have had a speculative eye on *United States v. Valenti*, 207 F. 2d 242 (C.A. 3d), decided in 1953, later approved in *Travis v. United States*, 364 U.S. 631, decided January 16, 1961, both of which held that the place of filing was the only proper venue in which to prosecute for a false non-Communist affidavit filed by labor union officers. The latter case was proceeding through the courts when the indictment was returned. Or possibly, the draftsman had in mind *United States v. Buchanan*, 238 Fed. 877 (N.D. Calif., 1917), holding that where travel and subsistence allowances were obtained from the Government by false statements, the offense of converting Government property to defendant's use was committed at the place where the false statements were made. As his 1955 tax return was shown to be a false document, there is no merit in appellant's contention (Br. 48) that the District Court's instruction to the jury was erroneous in stating that filing a tax return could be a basis for finding that part of the offense was committed in San Francisco.⁵ Nor was exception taken before the jury retired, or thereafter to this charge, as required by Federal Rules of Criminal Procedure, Rule 30.

The tax refund check being issued and mailed to appellant from San Francisco, this established venue there for the violation of 18 U.S.C., Section 641, by stealing and converting to his own use property of the United States worth more than \$100. The words "steal" and "stolen" are not words of fixed common law meaning and have been interpreted to include misappropriation by false pretenses and embezzlement.

⁵ The charge of the court as to venue was as follows (13 R. 1323) :

"You will notice that the indictment charges that the offenses referred to were committed in San Francisco. It is necessary for the prosecution to prove the venue as thus alleged.

"Now, as to each of the substantive counts, that is, the counts except the conspiracy count, that is, the counts charging use of a false document and charging theft by false pretenses and charging false claims for refunds to be filed, it would be sufficient if you find that the defendant committed any part of these respective offenses in San Francisco as by causing a tax return to be filed there, or by aiding and abetting in the preparation or signing of a tax return there filed. As to the conspiracy charge it would be sufficient if you find that any one of the overt acts charged in the indictment with respect to the conspiracy was done or caused to be done in San Francisco."

United States v. Turley, 352 U.S. 407, 411; *Smith v. United States*, 233 F. 2d 744, 747 (C.A. 9th). Section 641 of Title 18 is intended to encompass not only common law larceny and embezzlement, but acts "which shade into those crimes, but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette v. United States*, 342 U.S. 246, 269. The false pretenses by which appellant secured the tax refund were made at San Francisco, in the return filed there, and his offense against Section 641 therefore was begun in the Northern District of California, even if it was completed at Los Angeles, where he caused the check to be negotiated. Prosecution in the Northern District of California was therefore proper. 18 U.S.C., Section 3237.⁶

Appellant, though he moved for severance and other relief, made no motion to transfer the trial to the Northern Division, but stood on his objection that he did not consent to trial in the Southern Division. (4 R. 71.) Interpreted as a motion to transfer, the foregoing objection was not timely under Federal Rules of Criminal Procedure, Rule 22, as on September 23, 1960, the court allowed appellant two weeks within which to make motions (1 Supp. R. 22, filed December 21, 1966) and

⁶ Section 3237 of Title 18 reads as follows:

"§ 3237. *Offenses begun in one district and completed in another.*

"(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

"(b) Notwithstanding subsection (a), where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of the Internal Revenue Code of 1954 (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

his objection to trial in San Francisco, was made on November 7, 1960 (4 R. 71).

II. Denial of continuance was a proper exercise of discretion

Appellee's short answer to appellant's complaint that he was deprived of the effective assistance of counsel because further continuance was denied is that appellant and his attorney were aware since 1958 that the subject matter of the indictment was under investigation, that appellant's attorney himself suggested November 7, 1960, as a firm trial date, that the District Court at no time receded from its clearly expressed view that the trial should proceed no later than November 7, 1960, that the court made available all discovery to which appellant was entitled and all assistance by way of subpoena and writs of habeas corpus ad testificandum, for which he made proper application, and that appellant had the benefit of every proper defense which he could muster and was not prejudiced by denial of a further continuance. The measures taken by the District Court to aid appellant in his trial preparation were truly extraordinary, but the court also properly weighed the interests of the other defendants and their counsel, the Government's preparation and readiness, and the legitimate interest of the court in maintaining its own calendar. Its action was a proper exercise of discretion and is not a reviewable matter. *Elkins v. United States*, 266 F. 2d 588, 595 (C.A. 9th), reversed on other grounds, 364 U.S. 206; *Shockley v. United States*, 166 F. 2d 704 (C.A. 9th), certiorari denied, 334 U.S. 850.

On November 7, 1960, an investigating agent testified on appellant's motion for a continuance that he first contacted appellant in July, 1958, at which time appellant refused to make a statement, and that appellant told the agents that Mr. Cragen was his attorney (5 R. 30-33), and Mr. Cragen stated in argument to the District Court that he was contacted by the agents in 1958 (4 R. 1-3). This witness also testified that in 1958, appellant filed a writ of habeas corpus ad prosequendum in the District Court demanding immediate prosecution (5 R. 30) and appellant testified at the trial that he did this to vindicate himself in the eyes of the California Adult Authority

(11 R. 1051). His petition and the order of the District Court denying the writ on August 22, 1958, was certified to this Court in the Supplemental Record filed here on September 8, 1966.

Mr. Cragen was appointed attorney for appellant on September 15, 1960 (2 R. 66) in Criminal No. 37418, which was superseded by the indictment in Criminal No. 37513, returned September 21, 1960, and this latter indictment is the basis of the conviction and appeal in this case. Mr. Cragen was appointed attorney for appellant in Criminal No. 37513 on September 22, 1960. (1 Supp. R. 6, filed December 21, 1966.) On September 23, 1960, Mr. Cragen objected to the October 10, 1960 trial date which had been set (2 Supp. R. 9, filed December 21, 1966), and stated that his first available trial date would be October 17, 1960 (*ibid*, p. 14) due to state court engagements. He stated that he wished to devote eight days to preparation (*ibid*) and stated "I would suggest that as a date certain, Your Honor, November 7." (*Ibid*, p. 15.) He stated "I could go to trial earlier than that, but I don't believe I could have the case prepared before that." (*Ibid*, p. 17.) The District Court stated it would "go along" but might advance the trial date if counsel for other defendants did not confirm the arrangement (*ibid*, p. 18), and the court stated "I am going to insist on performance" (*ibid*, p. 19). The court repeated that November 7 was the trial date for all defendants. (*Ibid*, p. 24.)

Thereafter, continuances were requested and denied by the pretrial judge on October 25, 1960 (2 Supp. R. 6, filed December 21, 1966), and again on November 4, 1960, when the court summarized his reasons to be (1) that appellant at his own request, had been maintained by court order in the San Francisco jail, rather than Folsom Prison since September, and that this procedure was "straining the notions of comity pretty hard," (2) that the court had to consider other contingencies in the case, such as maintaining troublesome prison convicts in the San Francisco Jail, and (3) other factors such as the court's calendar and the readiness of the Government to proceed. The court also noted the central role of appellant in the over-all conspiracy charges (4 R. 60-65).

Although Mr. Cragen protested in these hearings, and by affidavit filed November 4, 1960 (1 R. —) that he was not prepared to go to trial, there is no showing that any aspect of appellant's defense had to be neglected. The one persistent object of pretrial preparation stated by appellant and Mr. Cragen was to get prison records and prior statements of the prison convicts who were involved in the case (see motions filed October 24, 1960 and November 4, 1960, and 2 R. 5-14, 84-90; 3 R. 9-26, 33-34). The records shows that numerous subpoenas duces tecum and writs of habeas corpus ad testificandum were issued on behalf of appellant, and that the Folsom Prison education supervisor,⁷ five prison inmates⁸ and three jail inmates⁹ were called as defense witnesses in addition to the five prison inmates¹⁰ and two prison officers¹¹ called and cross-examined as Government witnesses. Professor Paul L. Kirk was also called as an expert handwriting witness for defendant at the Government's expense. (11 R. 1114.)

The trial judge also considered and denied a defense motion for continuance. (5 R. 8.) The Government's case began November 7, 1960, and occupied eight trial days. The defense was not required to proceed until November 21, 1960 (10 R. 911), and the case was not submitted to the jury until November 29, 1960 (13 R. 1336).

Appellant's guilt on Counts I and II seems entirely free from any doubt, and there is no suggestion of any defenses whatsoever to those counts which were left insufficiently developed. Appellant was not convicted on any of the other counts, which were the subject matter of the bulk of his pretrial motions.

⁷ Donald Moore (10 R. 962; 12 R. 1166).

⁸ Manuel Escarrega (10 R. 931), Rudolph Holley (10 R. 938), LaVern Speer (10 R. 945), LeRoy Plummer (10 R. 955), and William Davenport (10 R. 983).

⁹ Leonard Garbey (10 R. 912), Alan Dale (10 R. 919), and Richard Melander (10 R. 993).

¹⁰ Richard Black (6 R. 298), Everett Nelson (7 R. 387; 9 R. 854), Gilbert Hayes (8 R. 555), Willie Davis (8 R. 586), and Elmer Tinsley (8 R. 598).

¹¹ Jack Stark, prison accounting officer (7 R. 342), and Dr. Herbert S. Singer, prison psychiatrist (8 R. 693).

III. Proof that the 1955 tax return was false was adequate to sustain the verdict

Appellant's attack on the sufficiency of the evidence to show that he is guilty (Br. 18-19) ignores both the charge and the proof. Whereas Counts I and II charged false representations as to (1) wages received, (2) taxes withheld, and (3) exemptions claimed, appellant addresses his contention only to the first item. Proof of falsity of any one item charged would sustain the guilty verdict. *Arena v. United States*, 226 F. 2d 227 (C.A. 9th), certiorari denied, 350 U.S. 954; *United States v. Otto*, 54 F. 2d 277 (C.A. 2d). That appellant was not entitled to exemptions for his divorced wife, Goldye Morgan, and his "uncle", Weisbart, is not even questioned in appellant's brief. Furthermore, appellant having testified and introduced other evidence in his own behalf, he waived the right to stand on his mid-trial motion for an acquittal, as the sufficiency of the evidence is now to be judged in the light of all evidence in the case, whether introduced by plaintiff or defendant. *United States v. Haskell*, 327 F. 2d 281, 283 (C.A. 2d), and the evidence is to be viewed in the light most favorable to the Government. *Young v. United States*, 298 F. 2d 108, 111 (C.A. 9th).

The evidence showed that during 1955, Lowell Lyons, Jr., was continually in jail after April 11, 1955, and appellant himself was continually in jail after January 25, 1955. He had left California for Houston, Texas, on January 12 or 15, 1955. In July, 1955, he filled out an employment history form for the prison authorities which did not list Lyons as an employer. Mrs. Weisbart did not testify that her own husband worked for Lyons in 1955, as appellant represents (Br. 19), but that he had worked for Lyons at an unspecified time, so that there was substantial probative force to the fact that the Los Angeles District Director's office had no record of Lyons having filed an employer's quarterly withholding return (Form No. 941) for 1953 to 1956, inclusive.

The jury had ample reason to disbelieve appellant's trial testimony that Lyons paid him \$2,150.50 in cash in Lyon's office early in January, 1955. Appellant's credibility was subjected to severe strains in the matter of, *inter alia*, the Form W-2 which he both asserted and denied he had received from Lyons, in the

matter of where he mailed his tax return (in view of the entry in his prison mail register showing a communication mailed to the San Francisco District Director's office on March 13, 1956), in the matter of his divorced wife and his "uncle" Weisbart, and in the matter of the numerous gifts of money he allegedly made to Weisbart while in the Los Angeles Jail, despite the fact that he had less than \$100 when booked at the jail on January 25, 1955. There was also the matter of the completely dishonest means by which he exploited the services of Los Angeles attorney Littlefield to procure the forgery of his divorced wife's endorsement on the tax refund check, Exhibit 2.

Judged most favorably to the Government, as it must be in this posture of the case, the evidence amply permitted the jury to find appellant received no wages from Lowell Lyons in 1955.

Appellant's additional contention (Br. 46) that "he is blameless for the amount refunded to him" because he left it to the Internal Revenue Service to determine his tax, ignores the specific charge in Court I that he *used* a false document. Appellant was not charged under 18 U.S.C., Section 287 with presenting a false claim against the United States, so that it is not necessary to consider this ingenuous argument. However, it may be noted that the test of a false document under 18 U.S.C. Sec. 1001 is whether it is calculated to or intrinsically capable of inducing agency action. *Brandow v. United States* (C.A. 9th), 268 F. 2d 559, 565. It is not even necessary that the Government actually rely upon, or suffer a loss from, the false document. *Morgan v. United States*, 301 F. 2d 272, 275 (C.A. 9th); *Blake v. United States*, 323 F. 2d 245, 247 (C.A. 8th).

Furthermore, as the sentences on Counts I and II were wholly concurrent and no fine is involved, either Count will support the conviction. *Beck v. United States*, 298 F. 2d 622, 626, (C.A. 9th), certiorari denied, 370 U.S. 919.

IV. Appellant's letters (Exs. 7 and 11) to attorney Littlefield were not privileged nor was he contumaciously denied pre-trial production thereof by the government

There is no merit to appellant's contention (Br. 20-24) that Plaintiff's Exhibits 7 and 11, being appellant's letters to at-

torney Littlefield transmitting the tax refund check with instructions for getting it endorsed, were subject to the attorney-client privilege and were withheld from him prior to trial in violation of an alleged court order for production and discovery.

Although appellant testified he considered the letters were "highly confidential" (6 R. 212), the facts previously stated show that they were not written to secure legal advice and that Littlefield was not employed to render any advice or assistance to appellant with regard to his 1955 tax return or his rights in or to the tax refund check. The District Court (6 R. 210) correctly relied on *Olender v. United States*, 210 F. 2d 795, 806 (C.A. 9th), which states:

We think the ruling of the trial court was correct. The attorney-client privilege is limited to communications made in the course of seeking *legal advice* from a professional legal adviser *in his capacity as such*. 8 Wigmore on Evidence, § 2294. Thus, communications to an attorney in the course of seeking business rather than legal advice are not privileged, *United States v. Vehicular Parking*, D.C. D. Del., 52 F. Supp. 751; nor are communications to an attorney who acts simply as a scrivener of deeds, or who simply deposits money in a bank for his client. *Pollock v. United States*, 5 Cir., 202 F. 2d 281. Coming a bit closer to the instant case, the privilege has been held inapplicable to communications to one who was both an attorney and accountant where made solely to enable the practitioner to audit the client's books, *In re Fisher*, D.C. S.D. N.Y., 51 F. 2d 424; or to simply prepare a federal income tax return. *Clayton v. Canada*, Tex. Civ. App. 223 S.W. 2d 264; see also *United States v. Chin Lim Mow*, *supra*.

The District Court also correctly denied (6 R. 220) appellant's motion to quash Exhibits 7 and 11 (6 R. 217). This motion was made on the ground the pretrial judge had ordered the government to allow inspection "of all items which were to be used in evidence as against defendant Morgan which were claimed to be those of defendant Morgan's." Appellant's written motion for discovery (1 R. —) was filed on October 24, 1960 and demanded

“a copy of all statements, records, affidavits, reports, documents, letters, files, opinions and data on file or in possession of the United States Attorney or under his control which pertains to the cause of *United States v. Morgan, et al*, and as to each and every co-defendant and co-conspirator * * *”

On November 1, 1960, the pretrial judge ruled as follows on this motion (3 R. 26):

“Well, as I see it, without prejudice, I am going to deny this motion except to the extent that the United States will make available for Morgan or his inspection anything that they claim they took from him; and they should be made open to him for his inspection and copying, if necessary. Now, if I have left out anything, I will simply say to you that I would like to hear a separate motion specifying what you want in terms of some degree of certainty or some degree of specificity—that’s a mouthful—and then I will pass upon it. I am not going to decide this to your prejudice other than to permit that—I am going to deny the motion as it stands now without prejudice.

Now, does that answer your question?

Mr. Cragen, yes, Your Honor.”

On November 4, 1960, the pretrial judge restated his order to be as follows (4 R. 38):

“* * * as to those documents which the Government claims were prepared and filed with the Government by the defendant, that he ought to see them. As to others, no. Because unless they were seized from the other person by some sort of process or taken in some sort of a search which was adverse * * *

The District Court stated its order for production by the government covered appellant’s tax returns because “they are documents that came into the hands of the Government by the ordinary process of business.” (4 R. 38). Again, the Court restated its views to be that the government should let the defendant see documents “that you claim belong to him”, but that as to other documents, the defendant had to comply with the

rule "of showing that they were seized by some sort of process from the other person or taken in some sort of adversary type of transaction." (4 R. 39).

Exhibits 7 and 11, having been written to and produced at the trial by attorney Littlefield, were obviously not "obtained from or belonging to the defendant or obtained from others by seizure or process" within the meaning of Rule 16 of the Federal Rules of Criminal Procedure (prior to 1966 amendments), and the District Court's orders accordingly excluded them from the discovery order.

Finally, these documents were admittedly exhibited to defense counsel a day in advance of their offer in evidence. (6 R. 220). They are simple documents written by appellant himself and of which he was completely aware. His testimony exhibited complete knowledge of them and there is no suggestion of any additional defense measures which might have been taken with regard to them.

V. The comity practiced in this case between the State and Federal Governments demonstrates an intent to return appellant to the state authorities to complete service of his state sentence and to make his federal sentence operative only thereafter

Appellant's proposition No. V is an argument that his delivery by the Warden of Folsom Prison on September 9, 1960, to the United States Marshall pursuant to a writ of habeas corpus ad prosequendum, issued by the District Court, amounted to a complete relinquishment of jurisdiction by the State of California to the Federal Government. This thesis is predicated on the assumption that the issuance of a writ of habeas corpus ad prosequendum at the application of the federal prosecutor is not an authorized procedure, that the transfer was simply a matter of voluntary cooperation by the California authorities, and that their action constituted, in effect, a commutation of the state prison sentence because the wording of the writ stated that after the prisoner had been produced for arraignment, the Warden should "abide by such order of the above-entitled Court as shall thereafter be made concerning the custody of said prisoner," and the District Court implemented this phrase by

ordering that appellant not be returned to the state prison pending trial but instead be kept in the San Francisco jail. From these premises, appellant contends two consequences necessarily follow: (1) that he became entitled to and was erroneously denied bail prior to trial, and (2) that the state prison sentence was immediately terminated and the subsequent five-year (concurrent) federal sentences started to run when they were pronounced on December 22, 1960, and have now expired.

A review of the pertinent facts shows that no commutation of sentence was intended or effected, and that the federal sentence was not ordered to, was not intended to, and could not legally have commenced to run until appellant finished serving his state prison sentence, after which he elected not to begin service of the federal sentence imposed in this case.¹²

The first writ¹³ of habeas corpus and prosequendum was dated September 8, 1960,¹⁴ and issued to bring appellant before the Court for arraignment on the indictment in Criminal No. 37418, which preceded indictment No. 37513. The application for the writ was signed by Assistant United States Attorney Schnake on September 8, 1960. The body of the writ read as follows:

WE COMMAND that you have and produce the body of ROBERT E. MORGAN, alias Leroy Frank Holman—A-33442, in your custody in the hereinabove-mentioned institution, before the United States District Court, in and for the Northern District of California, Southern Division, on September 9, 1960, at 9:30 a.m., in order that said prisoner may then and there appear for arraignment upon the charges heretofore

¹² The election is recited in the memorandum opinion of the District Court dated May 17, 1965, and certified to this Court by Supplemental Record filed June 4, 1965.

¹³ A second writ dated January 17, 1961, to the Warden required production for arraignment on February 6, 1961, and the Marshals return thereon shows production and return to custody on that day. (Supplemental Record filed September 8, 1966). Docket entries show that on February 6, 1961, Counts III and VI were dismissed.

¹⁴ On January 30, 1967, appellee furnished the Clerk of this Court two certified copies of the writ dated September 8, 1960.

filed against him in the above-entitled Court, and that immediately after said arraignment to return him forthwith to the said hereinabove-mentioned institution, or to abide by such order of the above-entitled Court as shall thereafter be made concerning the custody of said prisoner.

When arraigned on September 9, 1960, appellant asked the Court to restrain the state authorities from returning him to San Quentin Prison because he would be put in isolation and hampered in preparing his defense and conferring with his attorney, Mr. Cragen. Appellant said the prison authorities intended to "suppress" him because he was going to disclose to the Court certain crimes in which the prison officials were involved. The Court ordered the Warden to return appellant to Court on September 15, 1960, for hearing on this Motion. (2 R. 6-15).

On September 15, 1960, extensive argument and colloquy was had on this motion. (2 R. 3-82). The Court finally stated its decision would be as follows (2 R. 82):

Well, then, we are all in agreement, if you don't disagree with that. Then that will be my order, that he be taken into custody by the Marshal and placed in confinement and placed in county jail No. 1 for keeping until his trial has been concluded, at which time he will be returned to the custody of the Warden of San Quentin Prison for service of the state sentence.

Appellant sought, unsuccessfully, to have the District Court admit him to bail on the federal indictment, as appellant felt he could then attack the validity of the state conviction directly because it would be the only remaining basis for a denial of bail by the District Court. (2 R. 12). Appellant acknowledged to the District Court that he knew and accepted the fact that he would be serving "dead time" while confined in the San Francisco jail. (Ibid, pp. 73, 80.)

In a further hearing on September 23, 1960, bail of \$2,000 was set by the District Court and the Court asserted that appellant, though in the San Francisco county jail, "will be in state custody," and appellant again acknowledged he knew he

was doing "dead time." (1 Supp. R. 22-23, 25-28, filed December 21, 1966).

On October 25, 1960, a further hearing was held on various Motions of appellant. (2 Supp. R. 2-30, filed December 21, 1966). Appellant had been transferred to the Alameda county jail because he was dissatisfied with restrictions on his trial preparation at the San Francisco county jail. (Ibid, p. 5.) Appellant contended he was entitled to be admitted to bail on the federal charge, and complained that the State would not place a "hold" against him. (Ibid, p. 16.) The Court's views were expressed as follows:

But assuming he put up bail without a hold, I think the State authorities could pick him up, because I don't think that under my writ of habeas corpus—well, he's bailable. The writ of habeas corpus doesn't direct that he be permitted to be at large. The habeas corpus is *ad prosequendum*." (Ibid, p. 17.)

I think under the comity provisions, this Court is duty-bound to let him finish his state time. He is serving dead time so far as the state is concerned, because he's asked to be taken out of state custody while he's going through this preparation, and he has been very frank to admit that. (Ibid, p. 18.)

I think the state has acceded to that extent to the federal jurisdiction, but only to the extent of being tried by federal jurisdiction for the federal crime. And when that act has been concluded, the prosecuting, whether successful or unsuccessful, he must be returned. And in the meantime, he is a custodial problem of the Federal Government, subject to being returned to the State at any time this matter is terminated. (Ibid, p. 20).

As a matter of fact, I am inclined to think that under these circumstances, I could probably hold this man without bail. (Ibid, p. 21.)

* * * you are going to be returned whether you are guilty or not guilty, it makes no difference as far as that is concerned. You are going to be returned to state authorities for service of your state sentence, and you can challenge that any place you want to in accordance

with the jurisdiction of the Courts involved. (Ibid, p. 23.)

* * * I do not deem that we have any jurisdiction over this man except for prosecuting. We don't have a jurisdiction to let him go out on the street and we don't have any jurisdiction to do anything else except to prosecute him for the federal offense in which he is involved. (Ibid, p. 27.)

On October 31, 1960, a hearing was held (3 R. 2-48), on the Court's Order against state authorities to show cause why they should not be restrained from interfering with appellant's posting bond and from rearresting him thereafter. Appellant's attorney argued that after the San Quentin Warden, pursuant to the writ, surrendered appellant to the United States Marshall, then the question of comity "goes out the window" because appellant was solely in the custody of the United States Marshal and the state allegedly acknowledged this by not placing a hold against appellant or giving him credit on his sentence. (Ibid, pp. 8-15.) A California Assistant Attorney General, Mr. McEnerney, appearing for the state authorities, informed the Court that (Ibid, p. 7): "If I were asked for advice, I would tell the state authorities to rearrest Mr. Morgan upon bail." Mr. McEnerney also stated that the release by the California authorities was "conditional" on exercise of adequate control by the Federal Court, and protested that the District Court, by admitting appellant to bail, would in effect be granting relief to appellant equivalent to habeas corpus on his state conviction, on which appellant was not eligible for bail. Mr. McEnerney also noted that he had never heard of a state prisoner being denied credit toward his sentence for time served unless he himself effected his absence, as by escape. (Ibid, p. 31.)

The Court then signed an Order which (1) ordered the United States Marshal to produce appellant before the United States Commissioner for tendering bail, (2) refused to grant an injunction forbidding the state authorities from assuming custody of appellant should he be released on bail, and (3) ordered the United States Marshal to maintain custody as before. (Ibid, p. 48). A written Order to this effect was thereupon

signed by the Court and filed on October 31, 1960. (1 R. —).

On November 4, 1960, in a further hearing (4 R. 1-90) the District Court restated its Order to be that the United States Marshal "maintains the custody of the defendant as heretofore" and the Court stated:

In other words, I am telling you so there won't be any misunderstanding about it, that I am telling the Marshal not to put this man at large on bail, because he is a prisoner of the State of California that we have taken out of the custody of the state by writ of habeas corpus ad prosequendum, and even though the United States has suggested that I fix thereon \$5,000 and I have * * * I am telling him why the offense is not bailable, he is not bailable. He is a prisoner and we are not going to turn him loose out on the street.

Now, if you want to appeal that, go to it; I don't care. And so, I am just telling the United States Marshal, you can make your record, to take him over and let him put up his bail, * * * but I am telling the Marshal to hold him in custody.

(4 R. 47).

The facts stated establish clearly that the District Court, in issuing the writ of habeas corpus ad prosequendum, exercised its powers subject to the continuing right of the California authorities to receive back the prisoner once the federal prosecution was concluded. The California authorities just as clearly asserted this right and very properly objected to any action by the federal authorities which would jeopardize the security of the prisoner's custody. It may be doubted that a workable comity in this field could be maintained without such mutual respect between the respective Governments.

A. The authority of the District Court to issue the writ of habeas corpus under 28 U.S.C., Section 2241 can hardly be questioned since *Carbo v. United States*, 364 U.S. 611, affirming 277 F. 2d 433 (C.A. 9th). It should be noted that in *Carbo*, although the prisoner contested the issuance of the writ, the

Court approved its use, thus answering appellant's argument that this writ can be issued only at the instance of a prisoner.

It has always been recognized that despite its nominal similarity to the "Great Writ" (habeas corpus ad subjiciendum), compliance with the writ ad prosequendum by the para-sovereign to whom it is addressed is entirely discretionary. *United States ex rel Moses v. Kipp*, 232 F. 2d 147, 150 (C.A. 7th); *Lunsford v. Hudspeth*, 126 F. 2d 653 (C.A. 10th). Furthermore, the prisoner "has no standing to raise the question of comity between two sovereign states. He cannot urge priority of one over the other." *Ramsey v. United States*, 248 F. 2d 532, 533 (C.A. 9th). (Defendant not entitled to vacate federal sentence imposed after California prison authorities released prisoner for federal prosecution.) See also, *Strand v. Schmittroth*, 251 F. 2d 590 (C.A. 9th), appeal dismissed, 355 U.S. 886.

B. Appellant's contention that he should have been admitted to bail by the District Court suggests these questions: (1) has he waived the right to complain of denial of bail; (2) was he entitled to be admitted to bail in such circumstances; (3) was he prejudiced by the denial of bail?

1. The District Court, in denying bail, informed appellant of his right to appeal, of which appellant did not avail himself at that time. The remedy for improper denial of bail is to exercise the right to appeal forthwith if it is denied by the District Court. *Ellis v. Chappell*, 230 F. Supp. 164, 167 (D.C.D.C.)

2. The right to bail pending trial as provided in the Eighth Amendment is not without limitation. *Carlson v. Landon*, 342 U.S. 524, 545 (Congress may forbid bail for aliens awaiting a hearing on deportation charges).

Appellant was a prisoner serving a state prison sentence pursuant to a final judgment. There can, therefore, be no point to discussing the recent development of more liberal rules for bail pending appeal.

Where a federal prisoner serving a prison sentence is indicted on new charges, he is not entitled to be admitted to bail for the purpose of preparing his defense. *Minker v. United States*, 326 F. 2d 411 (C.A. 3d). Nor is an escaped state con-

vict, when retaken, entitled to bail because of new charges. *Davis v. North Carolina*, 339 F. 2d 770, 777 (C.A. 4th), reversed on other grounds, 384 U.S. 737. If these cases are sound law, they apply a fortiori to the question of bail for a prisoner held for prosecution by the Federal Government by courtesy and consent of the state government, and the District Court was entirely right in concluding that appellant was not bailable in these circumstances.

3. As the California authorities informed the District Court they would re-arrest appellant instantly should he be admitted to bail, appellant has not been prejudiced by denial of bail. His conditions of confinement thereafter would doubtless have been much more rigorous than confinement in the San Francisco or Alameda County jails.

C. The District Court, in its opinion of May 17, 1965, correctly rules that appellant's federal sentence did not, was not intended to, and could not legally have commenced to run when he was sentenced on December 22, 1960, or when he was thereafter produced in federal courts on February 6, 1960, and September 24, 1962, pursuant to writs of habeas corpus ad prosequendum.

First in importance is that 18 U.S.C., Section 3568 provides for computation of service of sentence in the following terms:

§ 3568. *Effective date of sentence; credit for time in custody prior to the imposition of sentence.*

The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

If any such person shall be committed to a jail or other place of detention to await transportation to the

place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

In *Larios v. Madigan*, 299 F. 2d 98 (C.A. 9th), this Court held that even where the federal sentence did not specify whether or not it was concurrent or consecutive, the federal sentence started to run for a California state prisoner only after he was released from service of the state sentence and received for transportation to the place designated by the Attorney General for service of federal sentence.

The sentence of the District Court clearly means it was not to start to run until California had released appellant from his state sentence. It is not vague or ambiguous if construed reasonably as it should be. *McNealy v. Johnson, Warden*, 100 F. 2d 280, 282 (C.A. 9th). Indeed, it has been declared to be the duty of a federal court, lacking clear consent by the state authorities to immediate execution of the federal sentence (*Stamphill v. United States*, 135 F. 2d 177, 178 (C.A. 10th))—

to provide that its sentence shall begin at the expiration of the sentence of the state, and immediately upon imposition of such sentence to return him to the state penitentiary or other institution whence he came pursuant to the writ of habeas corpus ad prosequendum.

It has also been held that a federal sentence ordered by the court to run concurrently with a state sentence then being served is void. *United States v. Hough*, 157 F. Supp. 771, 777 (S.D. Calif.).

According to the recital on page three (3) of the opinion of the District Court dated May 17, 1965, appellant completed service of his state sentence and was released on February 15, 1965, by the California authorities to the United States Marshal to commence service of the sentence here involved. (Supp. R. filed June 4, 1965.) He thereupon elected not to serve this sentence. (*Ibid.*)

The District Court judgment provided that appellant's sentence—

will commence at the expiration of such confinement by any parole or release from such confinement, conditional or otherwise.

It may be that this wording was chosen with an eye to avoid the result in *Johnson, Warden v. Wright*, 137 F. 2d 914 (C.A. 9th), where it was held that a federal sentence framed "to begin upon the expiration of the sentences which the defendants are now serving in the Southern Illinois Penitentiary" did not become effective upon the parole of the state prisoner, and that the prisoner was therefore entitled to release from federal custody.¹⁵ At all events, it is clear that it was not intended to commence whenever appellant was temporarily removed to the federal courts for further criminal proceedings.

The contention that California abandons jurisdiction over its prisoners by turning them over to the Federal Government for prosecution is not new and has been raised and rejected in the state courts. *People v. Stoliker*, 192 Cal. App. 2d 263, 13 Cal. Rptr. 437. This Court has held the converse, i.e., that the Federal Government does not lose jurisdiction when the federal court allows a convicted prisoner to be taken and tried in a state court. *Sichofsky v. United States*, 277 Fed. 762, 765 (C.A. 9th).

VI. Co-defendant Davenport's entry of a plea of guilty caused no prejudice to appellant, and there was no error in denying a severance prior to trial

A. Co-defendant Davenport pleaded guilty to Count VII on November 9, 1960, the third day of trial. (7 R. 321). Davenport thereafter appeared as a defense witness, and testified on direct examination that he had never had any conversation with appellant about preparing tax returns. (10 R. 985). He was cross-examined whether he remembered telling the investigating agents on August 22, 1958, that appellant made out a 1955 tax return in the name of W. H. Reith, which Davenport admittedly signed and which

¹⁵ Thereafter, Wright's Illinois sentence was completely terminated and he was again taken into federal custody. *United States v. Wright*, 56 F. Supp. 489 (E.D. Ill.). In *Hunter, Warden v. Martin*, 334 U.S. 302, it was held that state parole was an expiration of the state sentence adequate to activate a similar federal sentence.

is specified in Count 4 as an overt act. After reviewing his question and answer statement, he stated "I still don't believe I told them definitely Morgan made the return out." (10 R. 988-990). He also testified that he could not "involve anybody in anything" and would not make a statement in court even if he knew who signed the Reith return, because of what might happen to him in prison. (10 R. 991-993). Having sought to benefit by Davenport's broad denial of discussing preparation of tax returns with appellant, he can hardly complain of this cross-examination.

When Davenport entered a guilty plea, appellant personally asked for a mistrial on the ground that the prosecutor contrived with government agents to hold Davenport's wife in the corridor while Davenport was taken by in her presence, all to the end of causing Davenport such emotional stress as to induce him to plead guilty. (7 R. 325). The prosecutor stated that, to the contrary, he had tried, unsuccessfully, to have the Marshal delay removing Davenport from the courtroom to avoid such a confrontation with the wife, who feared her husband. (7 R. 327). Appellant claimed the jury witnessed this confrontation (7 R. 331), but the bailiff informed the court that he escorted the jurors out and they were not present. (7 R. 332.)

The court denied the mistrial, and thereafter charged the jury that they should draw no inferences from the fact Davenport was no longer on trial, but should judge the evidence against each defendant separately. The jury were also admonished to read no newspaper accounts of the trial or any matters connected with it. (7 R. 334-336).

B. The joinder of appellant in this twelve count indictment was entirely proper under Federal Criminal Rule 8.¹⁶ Appel-

¹⁶ "RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

"(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions con-

lant was involved personally with each of the twelve counts. Even in the counts in which he was not named as a defendant, Nos. VII, VIII, X, and XII, the tax return involved was one of the false returns identified as overt acts in Count III. This is thus clearly a case where joinder as to appellant was justified, not only under Rule 8(a) but under Rule 8(b). *Schaffer v. United States*, 362 U.S. 511. As the various substantive offenses were easily compartmentalized and the jury refused to convict appellant on the conspiracy, it can be seen that the refusal of severance was no abuse of discretion, even overlooking appellant's failure to renew a demand after Davenport pleaded guilty. *Fernandez v. United States*, 329 F. 2d 899, 905, certiorari denied, 379 U.S. 832.

Counts IX, X, XI, and XII, involving appellant with the tax returns of co-defendant's Escarrega and Holley were completely severed on November 7, 1960, although the returns there involved were also overt acts in Count III.

The "good faith" of the prosecution in charging appellant on the general conspiracy is amply shown in that handwriting evidence linked him to the 1955 Hayes tax return signature (9 R. 777-778), and one Nelson, a former Folsom inmate, testified that appellant, variously, prepared returns, altered authentic Forms W-2, added fictitious dependants, or supplied blank Forms W-2, for the numerous tax returns specified as overt acts in Count III. Nelson, specifically, named appellant in connection with the following returns:

Exhibit No.	Taxpayer	Record reference
19	Nelson.....	7 R. 389
21	Baker.....	7 R. 404
23	Hayes.....	7 R. 414
25	Black.....	7 R. 425
29	Tinsley.....	7 R. 437
3	Escarrega.....	7 R. 460
5	Holley.....	7 R. 465

stituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

VII. Appellant has been supplied all assistance necessary and pertinent to the issues raised in his appeal

Appellant's complaint of deprivation of an adequate record on appeal can only be met by comparing the record on file with the Clerk of this Court with appellant's motions to supplement the record as made on July 13, 1961 and June 28, 1965:

Appellant's motion for:

1. Reporter's transcript of oral proceedings for September 22, 1960 and September 23, 1960

2. All Government exhibits

3. All defendant's exhibit

4. All written motions filed

5. All exhibits pertaining to Counts I and II

6. September 8, 1960, writ of habeas corpus ad prosequendum

Record on appeal:

Filed with Supplemental Record of December 21, 1966.

Contains all Government exhibits which were introduced in evidence, except the following:

No. 3. Escarrega tax return—1957

No. 4. Escarrega tax refund check—1957

No. 6. Holley tax refund check—1957

No. 29. Tinsley 1956 tax return

No. 90. Appellant's prison correspondence record.

Are in record on appeal, except for Defendant's Exhibit J, which was not received in evidence.

On file in record on appeal.

All defendant's exhibits are on file except No. J, which was not received in evidence.

Government exhibits pertaining to Counts I and II which were received in evidence were Nos. 1, 2, 7, 10, 11, 12, 13, 14, 35, 36, 37, 63, 64, 65, 78, 79, 81, 84, 87, 88, 89, 90 and 91. All of these are in the record on appeal except No. 90, as explained above.

Supplied on January 30, 1967 by appellee. This writ was not part of the record in this case, but in a preceding indictment.

Appellant's motion for :

7. September 15, 1960, writ of habeas corpus ad prose-quendum

8. February 6, 1961, writ of habeas corpus ad prose-quendum

Record on appeal :

No such writ discoverable. On September 9, 1960, the District Court ordered the Warden to produce appellant again on September 15, 1960, which would indicate no writ was necessary or issued.

No such writ issued. This was the return date for the writ issued January 17, 1961, which is in the record on appeal.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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JERROLD M. LADAR,
Assistant United States Attorney.

FEBRUARY 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967.

Attorney.

APPENDIX A

EXHIBITS

FOR THE PLAINTIFFS

	<i>Ident.</i>	<i>Evid.</i>
1. Income Tax Return for 1955—Morgan.....	145	234
2. Treasury Check, Robert Morgan.....	145	228
3. Income Tax Return M. A. Escarrega.....	146	653
4. Treasury Check, M. A. Escarrega.....	148	653
5. Income Tax return R. V. Holley.....	148	653
6. Treasury Check R. V. Holley.....	149	653
7. Letter to Littlefield 8/7/56.....	150	222
8. Photo—Escarrega	179	866
9. Photo—Holley	179	866
10. Divorce Decree, Goldye v. Robert Morgan.....	---	187
11. Letter to Littlefield 8/28/56.....	216	228
12. Card for Rec. & Ident. Sect. L.A. Sheriffs.....	247	251
13. Finger Print Card, FBI, Robert Morgan.....	253	255
14. Finger print card Sheriff's Office, I.A., Robert Morgan....	267	273
15. Income Tax return 1955 W. H. Reith & Attach.....	274	867
16. Income tax ret. 1955 W. H. & Nellie Reith.....	277	867
17. U.S. Treas. Check \$131.13, 12/16/57.....	278	867
18. Income Tax Return James King 1956.....	278	---
19. 1955 Income Tax Return of E. C. Nelson.....	282	394
20. Treasury Check, E. C. Nelson.....	282	395
21. 1955 Income Tax Return J. W. Baker.....	283	406
22. Treasury Check, John W. Baker.....	283	409
23. 1956 Income Tax Return, Gilbert Hayes.....	284	418
24. Treasury Check, Gilbert Hayes.....	284	422
25. 1956 Income Tax Return Richard Black.....	286	431
26. Treasury Check Richard Black.....	286	432
27. Income Tax Return W. A. Davis.....	287	1263
28. Treasury Check W. A. Davis.....	287	---
29. 1956 Income Tax Return E. R. Tinsley.....	289	454
30. Treasury Check, E. R. Tinsley.....	289	455
31. 1955 Income Tax return Gilbert Hayes.....	290	869
32. Treasury Check Gilbert Hayes.....	290	869
33. Photo E. C. Nelson.....	---	423
34. Recorded Statement, R. W. Black.....	311	---
35. Application for Mail & Visiting.....	344	348
36. Trust Ledger Robert Morgan.....	352	870
37. Trust Receipt.....	355	357
38. Trust Ledger, James King.....	358	---
39. Trust Receipt, King.....	359	---
40. Trust Ledger, Nelson.....	363	396

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41. Trust receipt, Nelson-----	---	396
42. Trust Ledger, John Baker-----	366	413
43. Trust Receipt, John Baker-----	367	413
44. Trust Ledger, Gilbert Hayes-----	368	420
45. Trust receipt, G. Hayes-----	368	420
46. Trust receipt, G. Hayes-----	369	---
47. Trust Ledger, Richard Black-----	369	432
48. Trust receipt, Richard Black-----	370	432
49. Trust Ledger, Willie Davis-----	371	---
50. Trust receipt, Willie Davis-----	371	---
51. Trust Ledger E. R. Tinsley-----	372	455
52. Trust Receipt, E. R. Tinsley-----	372	455
53. Trust Ledger, Holley-----	373	654
54. Trust Receipt, Holley-----	373	654
55. Trust Ledger, Escarrega-----	374	654
56. Trust Receipt, Escarrega-----	374	654
57. Photo of Baker-----	403	409
58. Photo of Hayes-----	---	419
59. Photo of Black-----	425	872
60. Photo of King-----	449	---
61. Photo of Tinsley-----	---	456
62. Income Tax Return Steinhoff 1959-----	629	---
63. Cert. of period of confinement of defts-----	---	651
64. Morgan's Work History Questionnaire-----	---	874
65. Questionnaire, Morgan's Social History-----	704	---
66. Marital History of Morgan-----	708	---
67. Photostat of letter, Morgan, 8/28/56-----	721	---
68. Exemplar of Royal Typewriter-----	746	---
69. Exemplar of Royal Typewriter-----	747	---
70. Handwriting sample, D. Apple-----	750	884
71. Group of documents, Apple File-----	751	---
72. Handwriting sample, Paez-----	752	---
73. Handwriting sample, Nelson-----	752	837
74. Handwriting sample, Nelson-----	753	837
75. Handwriting sample, King-----	754	885
76. Handwriting sample, G. Hayes-----	754	838
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78. Handwriting sample, Robert Morgan-----	761	763
79. Photostat-----	754	838
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81. Tax papers, re Lowell Lyons-----	---	886
82. Yellow paper with writing-----	998	999
83. Page from Gov't Calendar-----	---	1095
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85. S.F. Sheriff's card-----	---	1145
86. Handwriting sample Melander-----	---	1147
87. Return processing index file-----	---	1152
88. CC of Social Sec. Records-----	---	1166
89. Classification Assignment card-----	1168	1172

FOR THE PLAINTIFFS

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90. cc of part of record of R. E. Morgan.....	-----	1173
91. Yellow slip, A-33442 Morgan (Was Def't's Exhibit J for Ident.).....	-----	1179

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A. Sample of handwriting.....	801	995
B. Sample of handwriting.....	801	995
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D. Handwriting of Tinsley.....	851	1045
E. Handwriting of Holley.....	851	941
F. Handwriting of Davis.....	851	1045
G. Handwriting of Escarrega.....	851	934
H. Handwriting of Baker.....	851	1045
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J. Yellow Slip (Govt's 91).....	853	-----
K. Yellow slip.....	853	1113
L. Tax Return Nelson.....	-----	1163

Nos. 19227 and 19228

IN THE

See Vols.
3302
3306

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19227

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

SEINE AND LINE FISHERMEN'S UNION OF SAN
PEDRO, affiliated with SEAFARERS' INTERNA-
TIONAL UNION OF NORTH AMERICA, AFL-
CIO,

Respondents.

No. 19228

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

PAUL BIAZEVICH, *et al.*, dba M. V. LIBERATOR,
et al.,

Respondents.

RESPONDENTS' PETITION FOR REHEARING

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<i>ent Seine and Line</i>	<i>Various Named Indi-</i>
<i>Union.</i>	<i>viduals.</i>

Jeffries Banknote Company, Los Angeles — MA 7-9514

FILED

MAR 2 1967

FEB 21 1967

WM. B. LUCK, CLERK

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Nos. 19227 and 19228

IN THE

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et al.,
Respondent.

RESPONDENTS' PETITION FOR REHEARING

PETITION FOR REHEARING

Respondents, by their counsel of record, respectfully urge that the Court grant a rehearing to reconsider portions of its opinion rendered on January 6, 1967, on the grounds that although the Court found the Trial Examiner and Board erred in depriving Respondents of

essential procedural rights, it adopted new and stringent standards, not urged by the Board, or by the Court during argument, and heretofore not supported by authority. Without at least a rehearing on the points raised herein, Respondents will be forever foreclosed from meeting the novel tests promulgated by the Court. It is respectfully submitted that the Board's decision was rendered upon an incomplete record, created by the Board's errors. The magnitude of the case, the twelve years of litigation, and the potential economic impact upon Respondents warrant a rehearing in the premises.

I

GROUND S URGED FOR REHEARING

This Court has unfortunately and surprisingly reached conclusions that result in treating the series of procedural errors committed below in such a manner that the Board, and its employees, will have no hesitancy in the future in depriving other Respondents of their procedural rights, as long as such deprivation makes it impossible for the Respondents to meet the tests set forth in the instant case. Essential due process requires that certain procedural safeguards be observed to protect the basic right of fair hearing guaranteed by the Constitution of the United States, to say nothing of basic rules of fair play. Respondents respectfully request that the Court's following conclusions be reconsidered:

- 1. That the order of the Board should be enforced without further hearing with respect to the alleged fact that certain statements of witnesses were either lost or destroyed in good faith. (Opinion p. 5)**

Because the Trial Examiner erroneously revoked subpoenas duces tecum and ad testificandum (discussed *infra*) there was no testimony by the Board employees or the attorneys for the general counsel with respect to the care or lack of care taken in preserving the statements, or in searching the stockpile of documents in the Board's possession. There is nothing in the record to explain the inability of the Board to produce the statements,¹ even though witnesses testified that they gave Board agents statements that were not produced. (TR. 4369, 4372, 4460, 4466, 4576, 4577, 4638, 4640, 4677, 4678, 4684, 4689, 4788, 4792, 4795, 4953.) If the Board or its employees were reckless or negligent with respect to preserving the documents certainly there can be no finding of good faith.

In *Killian v. United States*, 368 U.S. 231 (1961) the Supreme Court remanded the matter to the District Court for findings regarding the nature of the destruction and the availability of the documents. In *United States v. Tomaiolo*, 317 F.2d 324 (2d Cir. 1963), *cert. denied*, 375 U.S. 865 (1963) the government agent took notes, transcribed them, and made the transcription available to the defendant's counsel. There was specific evidence respecting the practice of the government agent to allow the court to make such a finding. No such evidence is available to this court in this matter.

¹ See, e.g., Tr. 4372, 4373 where O'Brien, attorney for the general counsel, said "I can only say that I do not have either a questionnaire or a statement from this witness."

2. That the attorneys for the general counsel were applying the proper test in determining which statements of their witnesses should be made available to Respondents.

The court has apparently erroneously assumed (but not specifically found) that the attorney for the general counsel was applying a proper test when he selected which statements he would produce. At the reopened hearing the attorney for the general counsel represented to the Trial Examiner that he could not find additional *signed* statements of the witnesses (Tr. 4713, 4788, 5098, 5122), but when counsel for the boatowner respondents demanded notes and memoranda of Board agents taken at the time of interviews of witnesses, the attorney equivocated and said:

“There are no such documents *authorized and ratified* by the witness, and therefore, I must respectfully decline to produce any of the notes described by Mr. Ogren.” (Tr. 5099) (Emphasis Added)

As the Court has held, the statements need not have been “authorized” or “ratified” by the witnesses and Respondents were entitled to any substantially verbatim statements of witnesses in the Board’s possession. (Opinion pp. 8, 9) Moreover there is a clear possibility that such documents were withheld by the Board. In light of the Court’s requirement imposed upon Respondents regarding the proof of the prejudice sustained (discussed *infra*), Respondents certainly should be given an opportunity to examine the Board employees and attorney for the general counsel regarding the state-

ments that were not disclosed. *General Engineering v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965).

3. That the failure of the Trial Examiner to personally examine the Filter memoranda to determine whether they were producible was not a sufficiently grave error to deny enforcement. (Opinion p. 9)

The court cites *Harvey Aluminum, Inc. v. N.L.R.B.*, 335 F.2d 749 (9th Cir. 1964) for the proposition that if Respondents wished review of the Trial Examiner's determination as to the nature of the Filter memoranda we should have requested that they be submitted under seal to the court. In *Harvey Aluminum, supra*, the Trial Examiner examined the documents in question and made a determination which was subject to review. In the case at bar, however, no determination has yet been made by the Trial Examiner or the Board for this court to review. Certainly such a determination should be made by the trier of fact in the first instance, rather than the court of appeals. *General Engineering v. N.L.R.B.*, 341 F.2d 367 376 (9th Cir. 1965)

Moreover, this Court had an opportunity to examine at least a portion of the Filter notes during oral argument on this matter, and Chief Judge Barnes expressed shock and indignation when the Board attorney offered the notes to this Court at that late date. Certainly the reaction of Chief Judge Barnes at that time was the proper one, but now, after a lapse of more than one year since argument, the Court has reached a conclusion quite different, and expresses the feeling that the "obvious" prejudice which existed at the time of oral argument somehow was

diminished by the time the Court rendered its opinion. Respondents should not now be denied a remedy because the notes were not submitted to the court "under seal" when at least some of the notes were submitted by the Board and the court refused to examine them.

4. That the Trial Examiner's revocation of subpoenas duces tecum and ad testificandum issued to the Board employees was not a sufficiently grave error to deny enforcement. (Opinion p. 9)

This Court found in *General Engineering v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965) that there arose a need for further Board proceedings when the subpoenas issued to the Board employees were erroneously revoked. The case is certainly sufficient and controlling authority to require the same result here. The court, however, attempts to distinguish the cases on the basis of the offer of proof made by counsel for General Engineering in connection with the arguments against revocation of the subpoenas. However the court there specifically refused to consider the admissibility of any evidence sought to be produced in light of its ruling that the Board erred in revoking the subpoenas. 341 F.2d 367, 375, n. 14.

The alleged distinction, it is submitted, is one without significance and should not be used to avoid the application of otherwise controlling authority. Additionally, the instant case involved some 71 Board witnesses, many of which were alleged discriminatees with a definite interest in the outcome of the case. In such circumstances to require an offer of proof as to possible affidavits or

verbatim statements in the possession of the Board is an unreasonable expectation bordering on impossibility.

Without the Board employees' testimony regarding the procedures followed in interviewing potential witnesses, the care in storing any statements or memoranda, and the type of statements or memoranda which were actually in the possession of the Board, Respondents could never show that there would be unearthed hitherto undisclosed statements, and, accordingly, it would be impossible to tell whether any witnesses could be impeached, so naturally Respondents could never show that the Board would have reached other conclusions and made other findings.

5. That the Respondents are not entitled to relief from the inherent prejudice they suffered by the erroneous refusal of the Trial Examiner to inspect the Filter memoranda and his erroneous revocation of subpoenas issued to Board employees unless Respondents perform the virtually impossible task of showing that:

(A) The inspection of the Filter memoranda and the enforcement of the subpoenas would have actually unearthed hitherto undisclosed statements; *and*

(B) That the use of the statements for the purpose of cross examination would have successfully impeached the several witnesses involved; *and*

(C) The Board would have made different findings in light of the impeached testimony. (Opinion p. 10)

In adopting this three part test the Court has allowed the Board to persist in withholding evidence which the Court has determined should have been produced and

nevertheless obtain an order of enforcement, contrary to this Court's position in *General Engineering v. N.L.R.B.*, 341 F. 2d 367, 376 (9th Cir. 1965). Prior to the instant case the refusal to order production of documents "constituted error that could not have failed to prejudice" Respondents. *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403 (2d Cir. 1958). No prejudice is required to be shown when a Board attorney's relevant testimony is improperly excluded. *N.L.R.B. v. Capitol Fish*, 294 F.2d 868 (5th Cir. 1961). If the limitation of cross examination was to the Respondents "possible prejudice" the matter should be remanded for further hearing. *N.L.R.B. v. Blase*, 338 F.2d 327 (9th Cir. 1964).

In light of the fact that the attorney for the General Counsel was limiting his search to "signed" statements, the possibility of unearthing additional statements that are producible under the test properly set forth in the instant case is certainly more than remote; in fact, there is a substantial probability that many *documents were withheld that should have been produced.*

The second part of the Court's test requiring that Respondents show that several witnesses' testimony would have been successfully impeached, is quixotic at best. The rigors of trial and the uncertainty of results produced by proper cross examination render such a showing impossible. The emphasis placed upon certain points in an affidavit may differ from the emphasis placed on the same point during testimony, and such differences may or may not affect the Trial Examiner's opinion as to the credibility of the particular witness. *Cf., Tidelands Marine Service*, 126 N.L.R.B. 261 (1960). Omissions,

a different order of treatment, inconsistencies, refreshed memory or direct conflict between testimony and a pretrial statement could occur during cross examination as a result of the use of pretrial statements. Even if any or all of these results should occur with a particular witness, it would be impossible to say whether a witness was successfully impeached, since only the Trial Examiner can make the decision as to the credibility of a particular witness.

The last part of the test clearly renders the test void for lack of due process. "That the Board would or might have reached no different conclusion had the rejected evidence been received is entirely beside the point." *N.L.R.B. v. Burns*, 207 F.2d 434, 436 (8th Cir. 1953), quoting *Donnelly Garment Co. v. N.L.R.B.*, 123 F.2d 215, 224 (8th Cir. 1941). It is impossible to forecast the conclusions of the Board, but in any event the Board's "(f)indings cannot be said to have been fairly reached unless material evidence which might impeach as well as that which will support its findings is heard and weighed." *N.L.R.B. v. Indiana & Michigan Electrical Co.*, 318 U.S. 9 (1942). This Court should not allow the order to be enforced so long as there is a substantial likelihood that the witnesses of the Board were not fully and completely cross-examined.

6. That the requested in camera inspection of memoranda by the Trial Examiner and the enforcement of subpoenas duces tecum were the equivalent to requesting answers to written interrogatories.

A close analysis of this conclusion should cause the Court to reconsider. Pretrial discovery devices have re-

cently been encouraged by statute and Rules of Court to allow a more orderly presentation of evidence at the time of trial, to provide full and complete disclosure of relevant facts prior to trial, to encourage settlement, and to preserve early in the proceedings certain statements of witnesses when, presumably, the witnesses' memories are clearer than they would be at the time of trial, when the ravages of time may otherwise cloud precious memory.

On the other hand, the attempts by Respondents to obtain the pretrial statements of Board witnesses were designed to obtain the statements of witnesses that discovery-like processes previously created. It was an attempt to utilize statements produced prior to trial with the hope of presenting all of the facts in a manner which would allow the Trial Examiner to reach the most correct result. Certainly, if the credibility of certain of the witnesses could have been shaken by any pretrial statements in the possession of the Board, Respondents were entitled to use them for that purpose, as well as for the purpose of discovering other direct evidence that may have been disclosed in the pretrial statements.

II

CONCLUSION

It is respectfully urged that since the attorney for the General Counsel applied an inappropriate test in determining which statements he would disclose and since there is nothing on the record to explain the inability of the Board to produce certain statements that were supposed to be in its possession, and Respondents have never

been given an opportunity to properly cross-examine certain witnesses, or to examine Board employees with regard to the statements in its possession, or to meet the standards newly adopted by the Court, a rehearing should be granted to allow the Court to reconsider its Order.

Respectfully submitted,

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OF SAN PEDRO

and

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By CECIL E. RICKS, JR.

Attorneys for Respondent

BOAT OWNERS, and various named
individuals

February, 1967

CERTIFICATE

I certify that, in connection with the preparation of this Petition for Rehearing, I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Petition is in full compliance with those Rules, and I further certify that this Petition is not filed for purposes of delay but in my opinion is meritorious.

Cecil E. Ricks, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH CLYDE AMSLER,
JOHN WILLIAM IRWIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

*See Vol.
3365*

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
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FILED

MAY 31 1967

WM. B. LUCK, CLERK

JUN 7 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH CLYDE AMSLER,
JOHN WILLIAM IRWIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH CLYDE AMSLER,
JOHN WILLIAM IRWIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES BARNES, CECIL AND ELY OF THE
UNITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL
CIRCUIT.

Appellee (hereinafter referred to as the Government) hereby
petitions for a rehearing to reconsider the judgment entered on May 3,
1967, on the following grounds.

The sole question which resulted in reversal of these judgments of
conviction was inadequately presented. Irwin never raised the question.
Amsler did not specifically designate the §3432 point among some 37
points on appeal [C. T. 208]. Although Amsler did raise the point in his
opening brief, neither Amsler nor the Government adequately briefed the
question. The point was not touched on by counsel or by the court during
oral argument.

Judge Cecil correctly stated that "... It was apparently conceded and understood by the court and counsel throughout the entire pre-trial proceedings that Sinatra was released unharmed. For this reason it appears that the offense was considered and tried as a non-capital offense ...". However, the Government suggests that, by virtue of counsel's failure to brief and argue the question in the context of Smith and the entire record, this court reached incorrect inferences and conclusions. These are:

(1) That Judge East neglected to do what the Supreme Court in Smith, and this Court, said a trial judge must do, namely to "... make informed decisions prior to trial which will depend on whether the offense may be so punished" rather than "... await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense"; and that "It is the responsibility of the trial judge to interpret the indictment, determine what offense is charged and conduct the trial accordingly" (Smith v. United States, 360 U.S. 1, 8-9; this court's opinion at p. 7);

(2) That there could be no waiver of §3432 rights, notwithstanding defense counsels' failure to specifically request the benefits of such rights; and

(3) That the court must reverse under the plain error rule (court's opinion at p. 7).

It is the clarification of these inferences or conclusions which the Government respectfully suggests justify an en banc rehearing in the interest of justice.

which this Court felt were compelled under Smith ^{1/} and fully discharged his "responsibility . . . to conduct the trial accordingly" is confirmed by the record (See App. A and A-1). Surely in the light of this record it is not reasonable to conclude that Judge East failed to discharge his responsibility to interpret the indictment and to determine what offense was charged; nor can it be said that his decisions were not "informed" or that they were not made until the conclusion of the evidence [R. T. Vol. A January 20, 1964, pp. 27-29; R. T. pre-trial February 5, 1964, pp. -18, 74, 85; R. T. February 10, 1964, pp. 5-7, 12, 53, 94-111; Vol. V Motion To Suppress, pp. 504-505, 515; cf. United States v. Morris, supra. See Appendix A and Appendix A-1].

II

Assuming appellants were entitled to §3432 rights, these rights were waived.

Judge Cecil notes that this Court was unable to find in the record any specific request by defendants of the benefits of §3432 (p. 7). There was none. Nor does the record reflect any objection by defense counsel based on §3432 with respect to the ten extra peremptory challenges ^{2/} or

The precise holding of Smith is that any prosecution under the Federal Kidnapping Act must proceed by indictment and not by information regardless of whether or not the indictment alleges harm to the victim. The Government does not concede that Smith holds, for all purposes, that a suit under 18 U. S. C. 1201 must proceed as a capital case from the outset (Smith, supra, at p. 6) nor does the Government concede that, except by "clear dictum" Smith rejected the rule that before one can be prosecuted for the capital offense he must be charged with it. United States v. Morris, 178 F. Supp. 694, 698; aff'd 277 F. 2d 927; cert. den. 364 U. S. 848; see Justice Clark's separate opinion in Smith at p. 12). Cf. Beck v. Miriani, 293 F. 2d 333 (6th Cir. 1961).

The right as to twenty peremptory challenges was raised neither by Irwin nor Amsler on this appeal (Amsler's op. br. pp. i-vii; Court's opinion at p. 7).

as to impaneling the jury (except as to the method of selection see p. 5),
nor was objection made to any Government witness.

Having failed to claim these rights in the court below, defendants
waived those rights in United States v. Morris, 178 F. Supp. 694, *aff'd*,
377 F.2d 927, cert. denied 364 U.S. 848. Morris dealt with the identical
question. In Morris, the victim was released unharmed; the case was
tried as a noncapital case; defense counsel failed to claim §3432 rights.
The court, in Morris, held that by "by failing to object to any of the
Government witnesses or to the impaneling of the jury, defendant cannot
now object, particularly where hindsight has disclosed neither surprise
... nor prejudice ... of any juryman, the major reason for ... these
procedural safeguards." (Morris, *supra*, p. 699).

Even constitutional rights may be waived. Lee v. United
States, 343 U.S. 747, 750; Brown v. Walker, 161 U.S. 591, 597; Diaz
v. United States, 223 U.S. 442, 450-451; Patton v. United States, 281
U.S. 276. Although under the aggravated facts in Smith, the court held
the waivers not binding, even Smith recognized such safeguards may be
waived (Smith, *supra*, at p. 9 and footnote at p. 5). Here only a statutory
right is involved which a fortiori may be waived. (For specific Supreme
Court authority as to waiver of §3432 rights see Morris, *supra*, p. 699.
Citing Logan v. United States, 144 U.S. 263, 304-307; Hickory v. United
States, 151 U.S. 303, and other cases.

III

Even assuming no waiver, there was no reason to reverse these
judgments of conviction under the plain error rule. Irwin was not convicted
of Count Two, the only count which involved a death sentence. If Irwin
were retried, he would not be entitled to the §3432 rights on retrial (C. T.

329, Vol. 19; R. T. 4310]. Even Amsler, having received an "implicit acquittal" as to the capital offense inherent in Count Two, cannot be retried for that capital offense under former jeopardy principles. Green v. United States, 355 U.S. 184, 190-198; United States v. Wilkins, 348 F.2d 844 (2nd Cir. 1965), cert. denied 385 U.S. 913. Why, then, should the court have ordered a retrial on this point? The court need not have reached the problem in Smith since there were five concurrent remaining counts free of any error. Cf. Gilbert v. United States, 359 F.2d 285 (9th Cir. 1966). No substantial rights were affected (See App. B-1).

As the court observed in Morris, "It would be illogical to grant a new trial for every error defense counsel makes in the conduct of a trial, unless that error is likely to result in some substantial harm to the defense. On the contrary to grant a new trial in this case, where the evidence is overwhelmingly in favor of defendant's guilt and the record indicates complete fairness to the defendant, would be a mockery of that justice and fair play to which the victims of this man's wrongdoing as well as the people of the United States are entitled." Morris, supra, at p. 699.

The Government respectfully suggests that the rehearing requested be granted en banc.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for purposes of delay.

I further certify that, in connection with the preparation of said Petition, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the said foregoing Petition is in full compliance with those rules.

/s/ Donald A. Fareed

DONALD A. FAREED
Assistant U. S. Attorney
Chief Trial Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MERRY WORTHINGTON KEENAN, JOSEPH
LYDE AMSLER, and JOHN WILLIAM
WIN,

Defendants.

No. 33087-CD

Los Angeles, California
February 10, 1964

GOVERNMENT'S OPENING STATEMENT

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA
3 CENTRAL DIVISION

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs.

7 BARRY WORTHINGTON KEENAN, JOSEPH)
8 CLYDE AMSLER, and JOHN WILLIAM)
9 IRWIN,)

Defendants.)

No. 33087-CD

Los Angeles, California
February 10, 1964

10 -----
11 GOVERNMENT'S OPENING STATEMENT

12 BEFORE:

13 The Honorable William G. East, United States
14 District Court Judge.

15 APPEARANCES:

16 Mr. Thomas Sheridan, Assistant United States
Attorney, appearing in behalf of the Government;

17 Mr. Charles Crouch, Counsel for the Defendant
18 Keenan; Messrs. Morris A. Lavine and George
19 Forde, Co-counsel for the Defendant Amsler;
20 Mrs. Gladys Towles Root, Counsel for the
21 Defendant Irwin.
22
23
24
25

* * * * *

THE COURT: The jury may hear the Government's opening statement.

OPENING STATEMENT

BY MR. SHERIDAN:

Your Honor, counsel, ladies and gentlemen of the jury: At this time I have an opportunity to tell you where the Government is going in this case; that is, what we intend to prove in the case.

When you were sworn in as jurors and when you were first called as prospective jurors, the Court outlined to you in general the Indictment. I am going to take this moment to read the Indictment to you, because it is the Government's intention to prove each and every essential allegation and each of the six counts of the Indictment.

As the Court told you, Count 1 of the Indictment is a conspiracy count, and it reads as follows: "Beginning on or about October 24, 1963, and continuing until on or about December 14, 1963, the Defendants Barry Worthington Keenan, Joseph Clyde Amsler, and John William Irwin agreed, confederated and conspired together and with each other to commit offenses against the United States as follows: 1, to unlawfully seize, kidnap, carry away and hold for ransom and reward Frank Sinatra, Jr. and transport him in interstate commerce in violation of 18 United States

Code, Section 1201; 2, to transmit in interstate commerce communications demanding and requesting ransom and reward for the release of kidnap victim Frank Sinatra, Jr., in violation of 18 United States Code, Section 1875(a); and 3, to receive, possess, and dispose of ransom money to be delivered for the release of kidnap victim Frank Sinatra, Jr. after he was kidnapped and transported in interstate commerce in violation of 18 United States Code, Section 1202.

"The objects of said conspiracy were to kidnap, transport and obtain \$240,000 in ransom money for the release of Frank Sinatra, Jr. To effect the objects of said conspiracy, the Defendants committed diverse overt acts in the Central Division of the Southern District of California, among which are the following: Number 1, on or about October 24, 1963, Defendant Keenan wrote a letter.

"2. On about November 15, 1963, Defendant Keenan rented 8143 Mason Avenue, Canoga Park, California, in the name of Frank A. Long.

"3. On or about November 19, 1963, Defendant Keenan arranged for the installation of a telephone and extension at 8143 Mason Avenue, Canoga Park, California.

"4. On or about November 21, 1963, Defendant Keenan rented a room at the Farmer's Daughter Motel.

"5. On or about November 29, 1963, Defendants Amsler

1 and Irwin met and stayed at the Farmer's Daughter Motel.

2 "6. On or about December 4, 1963, Defendants Keenan
3 and Amsler departed from Los Angeles with two handguns.

4 "7. On or about December 9, 1963, Defendants Keenan
5 and Amsler placed Frank Sinatra, Jr. in 8143 Mason Avenue,
6 Canoga Park, California.

7 "8. On or about December 9, 1963, Defendant Irwin
8 guarded Frank Sinatra, Jr.

9 "9. On or about December 9, 1963, Defendants Keenan
10 and Irwin drove to the Beverly Hilton Hotel, Beverly Hills,
11 California.

12 "10. On or about December 9, 1963, at 3:30 p.m.,
13 Defendant Keenan rented a car.

14 "11. On or about December 9, 1963, Defendant Amsler
15 guarded Frank Sinatra, Jr.

16 "12. On or about December 9, 1963, at 4:45 p.m.,
17 Defendant Irwin telephoned Reno, Nevada.

18 "13. On or about December 10, 1963, at 9:05 a.m.,
19 Defendant Irwin telephoned Reno, Nevada.

20 "14. On or about December 10, 1963, at 11:40 a.m.,
21 Defendant Irwin telephoned Reno, Nevada.

22 "15. On or about December 10, 1963, at 11:50 a.m.,
23 Defendant Irwin telephoned Reno, Nevada.

24 "16. On or about December 10, 1963, at 12:28 p.m.,
25 Defendant Irwin telephoned Reno, Nevada.

1 "17. On or about December 10, 1963, at 12:50 p.m.,
2 Defendant Irwin telephoned Carson City, Nevada.

3 "18. On or about December 10, 1963, at 1:10 p.m.,
4 Defendant Irwin telephoned Carson City, Nevada.

5 "19. On or about December 10, 1963, at 9:26 p.m.,
6 Defendant Irwin telephoned a residence in Bellair, Cali-
7 fornia.

8 "20. On or about December 10, 1963, at 9:57 p.m.,
9 Defendant Irwin telephoned on a public telephone at a gas
10 station at Camden Drive and Santa Monica Boulevard, Beverly
11 Hills, California.

12 "21. On or about December 10, 1963, at 10:00 p.m.,
13 Defendants Keenan and Amsler left 8143 Mason Avenue,
14 Canoga Park, California.

15 "22. On or about December 10, 1963, at 11:12 p.m.,
16 Defendant Keenan telephoned a public telephone at Western
17 Airlines Terminal, Los Angeles, California.

18 "23. On or about December 11, 1963, at 12:03 a.m.,
19 Defendant Keenan telephoned a public telephone at a gas
20 station at Sepulvida Boulevard and Olympic Boulevard,
21 Los Angeles, California.

22 "24. On or about December 11, 1963, at 12:20 a.m.,
23 Defendant Keenan telephoned a public telephone at a gas
24 station at Cashmier and Sepulvida Boulevard, Los Angeles,
25 California.

1 "25. On or about December 11, 1963, at 12:45 a.m.,
2 Defendant Keenan picked up a black valise at a gas station
3 at Cashmier and Sepulvida Boulevard, Los Angeles, California.

4 "26. On or about December 11, 1963, at 1:00 a.m.,
5 Defendant Irwin drove Frank Sinatra, Jr. from 8143 Mason
6 Avenue, Canoga Park, California.

7 "27. On or about December 11, 1963, the three
8 Defendants had a meeting.

9 "28. On or about December 11, 1963, Defendant Irwin
10 accepted \$50,000, in violation of 18 United States Code,
11 Section 371."

12 That is the first count in the Indictment.

13 Count 2: "On or about December 8, 1963, Defendants
14 Barry Worthington Keenan and Joseph Clyde Amsler knowingly
15 transported in interstate commerce from Stateline, Cali-
16 fornia into the State of Nevada and then into Los Angeles
17 County, California, within the Central Division of the
18 Southern District of California, one Frank Sinatra, Jr.,
19 who had theretofore been unlawfully seized, kidnapped and
20 carried away and held for ransom, as the Defendants then
21 and there well knew, and at said time and place Defendant
22 John William Irwin aided, abetted, counseled, induced,
23 commanded and procured the commission of the above-alleged
24 offense."

25 Counts 3, 4, and 5 are all of the same type. I will

1 read them quickly.

2 Count 3: "On or about December 10, 1963, at 9:05 a.m.,
3 Defendant John William Irwin knowingly transmitted in
4 interstate commerce from Los Angeles County, California,
5 within the Central Division of the Southern District of
6 California, to Reno, Nevada, a communication by telephone
7 containing a demand and request for ransom and reward for
8 the release of Frank Sinatra, Jr., who had been kidnapped
9 and was then and there being held for ransom as the
10 Defendants then and there well knew; and at said time and
11 place, the Defendants Barry Worthington Keenan and Joseph
12 Clyde Amsler aided, abetted, counseled, induced, commanded
13 and procured the commission of the above-alleged offense."

14 Count 4: "On or about December 10, 1963, at 12:50 p.m.,
15 Defendant John William Irwin knowingly transmitted in inter-
16 state commerce from Los Angeles County, California, within
17 the Central Division of the Southern District of California,
18 to Carson City, Nevada, a communication by telephone con-
19 taining a demand and request for ransom and reward for the
20 release of Frank Sinatra, Jr. who had been kidnapped and
21 was then and there being held for ransom as the Defendants
22 then and there well knew; and at said time and place,
23 Defendants Barry Worthington Keenan and Joseph Clyde Amsler
24 aided, abetted, counseled, induced, commanded and procured
25 the commission of the above-alleged offense."

1 Count 5: "On or about December 10, 1963, at 1:10 p.m.,
2 Defendant John William Irwin knowingly transmitted in inter-
3 state commerce from Los Angeles County, California, within
4 the Central Division of the Southern District of California,
5 to Carson City, Nevada, a communication by telephone con-
6 taining a demand and request for ransom and reward for the
7 release of Frank Sinatra, Jr., who had been kidnapped and
8 was then and there being held for ransom as the Defendants
9 then and there well knew, and at said time and place, the
10 Defendants Barry Worthington Keenan and Joseph Clyde Amsler
11 aided, abetted, counseled, induced, commanded and procured
12 the commission of the above-alleged offense."

13 Count 6 of the Indictment: "Beginning on or about
14 December 11, 1963, and continuing to December 14, 1963,
15 Defendants Barry Worthington Keenan, Joseph Clyde Amsler,
16 and John William Irwin, within the Central Division of the
17 Southern District of California, knowingly and willfully
18 received, possessed and disposed of \$239,985, which had
19 on December 11, 1963, been delivered as ransom and reward
20 in connection with the unlawful seizure, kidnapping,
21 abduction and carrying away and holding for ransom and
22 reward of Frank Sinatra, Jr., who theretofore had been
23 kidnapped and then transported in interstate commerce from
24 Stateline, California, into the State of Nevada, and then
25 into Los Angeles County, California, in violation of

1 18 United States Code, Section 1201; and at the above-
2 mentioned times, each of the Defendants knew that the money
3 had been delivered as such ransom and reward."

4 I point out just by way of quick review on the Indict-
5 ment, Count 1 is a conspiracy count and has 28 overt acts
6 alleged in the conspiracy count. Count 2 alleges the
7 kidnapping and the interstate transportation of the victim
8 Frank Sinatra, Jr. Counts 3, 4 and 5 are interstate
9 telephone calls demanding ransom money; the first one to
10 Reno, the second two to Carson City, Nevada. And Count 6
11 is the receiving, possessing and disposing of the \$239,985.

12 There is a little duplication in the Indictment in
13 that Counts 3, 4, and 5, although they go into much more
14 detail, are the same as overt acts 13, 17, and 18 as
15 charged in the Indictment. In other words, overt act 13
16 in the conspiracy count is spelled out in more detail as
17 being Count 3 in the Indictment. Also, overt act 17 of the
18 conspiracy count is Count 4 of the Indictment, and overt
19 act 18 in the conspiracy count is Count 5 of the Indictment.

20 An opening statement made by counsel is, of course,
21 not evidence. It is just a statement of what he anticipates
22 or what it is anticipated will be proved by that side of
23 the lawsuit. So what I am about to tell you in general
24 terms is what the Government anticipates the proof to be
25 in the case.

1 We will show that prior to October 24, 1963, the
2 kidnap plan was first conceived. You will note that is
3 also the date of one of the overt acts in the Indictment;
4 namely, the date that Barry Keenan wrote a letter, I believe
5 is the way the overt act is alleged.

6 We will show that in Phoenix during the end of October
7 and early November of 1963, that the plan was almost put
8 into effect. It was started upon. Barry Keenan, using
9 various aliases, using names like Larry Worthington, Larry
10 Wortman, William Hall, went to Phoenix during that period
11 of time, checked into a motel, rented a house under the
12 name of William Hall, had a telephone put in under the
13 name of William Hall, purchased two guns, two handguns,
14 which we will produce here as part of the trial. He pur-
15 chased those handguns, one under an assumed name. On the
16 other one he gave no name. These were private sales, one
17 from a gun shop, one from a private individual. This is
18 in the end of October and the first week of November of
19 1963.

20 We will then show that at that same period of time,
21 in Phoenix, Arizona, Frank Sinatra, Jr. was appearing at
22 the Arizona State Fair.

23 We move then into the middle of November. On November
24 14, 1963, Barry Keenan, using the name of Frank Long,
25 rented 8143 Mason Avenue out in Canoga Park, California.

1 On the 19th of the same month, a telephone with an exten-
2 sion was installed at those premises, again using the name
3 of Frank Long. During this period of time, namely, the
4 middle portion of November, 1963, Frank Sinatra, Jr. was
5 appearing at the Ambassador Hotel here in Los Angeles.
6 He appeared here from November 20th to around January 1st.

7 In the early weeks of December, 1963, the Defendants
8 had that residence at 8143 Mason Avenue in Canoga Park,
9 and telephone calls, long distance telephone calls were made
10 from the phone installed at that residence during the early
11 portion of December, the first few days in December of 1963.
12 From the first of January -- from the first of December of
13 1963 on, later on into December, Frank Sinatra, Jr. was
14 appearing up at a club up around Lake Tahoe as a performer.

15 We will show that on the 4th of December, 1963, the
16 Defendants Barry Keenan and Joseph Clyde Amsler left Los
17 Angeles, went from Los Angeles up to the Lake Tahoe area,
18 stopped at Bishop, California, on their way up. When they
19 got up there, they checked into a motel, using the names of
20 Joseph Gardner and Robert Allen, supposedly working for a
21 company known as Triangle Manufacturing. At that time
22 when they got up there around the 5th of December, 1963,
23 Frank Sinatra, Jr. was performing with the Tommy Dorsey
24 Band at one of the clubs up there in that area.

25 We will show that on Sunday, December 8, 1963, somewhere

1 between 8:00 and 9:00 at night, Frank Sinatra, Jr. was in
2 his room in a motel which is part of Harrah's Club. It's
3 in the area of Stateline, California, on the California
4 side, in Room 417 with another man, who is a trumpet
5 player in the Tommy Dorsey Band named John Foss. The two
6 of them were in Mr. Sinatra's room, received a telephone
7 call inquiring for someone else, was told that that person
8 wasn't there. Shortly after that, Barry Keenan and Joseph
9 Clyde Ansler entered Mr. Sinatra's room, Room 417 at the
10 motel, and on a pretext call to Mr. Sinatra, got inside
11 of the room, each of them brandishing guns. We will show
12 that the guns that they had were the same guns that were
13 purchased over in Phoenix, Arizona, in the period of the
14 end of October into the first week of November of 1963.
15 At that time they bound and gagged John Foss. Mr. Sinatra
16 was taken from the room and put into an automobile and
17 driven away.

18 As the car drove off, it was snowing at that time in
19 that area. Car tracks were visible going from California
20 into Nevada. Roadblocks were set up, alarms were put out.
21 The Defendants actually came to a roadblock. They got
22 through the roadblock. When they got through the roadblock,
23 apparently someone was in the trunk of the car. But they
24 got through the roadblocks, came on down into California,
25 and arrived in California early Monday morning.

1 I might point out the time of the roadblock. It was
2 apparently Boston type conditions; some sort of a blizzard
3 going on. It is late at night. They got through that road-
4 block, and perhaps other roadblocks, and got down into
5 California and went to the address of 8143 Mason Avenue in
6 Canoga Park.

7 At the time when they took Frank Sinatra, Jr. into
8 their custody and brought him down this way, Barry Keenan
9 and Joseph Clyde Amsler had not checked out of their motel
10 up in the Lake Tahoe area; so that on the following day,
11 Mr. Keenan rented an automobile.

12 I might backtrack for just a moment. Prior to this,
13 in April of 1963, Mr. Barry Keenan had a leased 1963
14 Chevrolet. That vehicle is involved in the case.

15 On the 9th, Mr. Keenan, over at the Beverly Hilton
16 Hotel, rented another 1963 Chevrolet. He drove that vehicle
17 from Canoga Park up to Lake Tahoe, checked out, turned around
18 and drove back. He was apparently alone. At the time of
19 that trip, Mr. Amsler and Mr. Irwin had Mr. Frank Sinatra,
20 Jr. in the 8143 Mason Avenue address in Canoga Park.

21 Then a series of telephone calls were made. Mr. Irwin
22 was the speaker. He called -- the first call came through
23 I believe on the -- and these calls are set forth chrono-
24 logically in the Indictment. On Monday, December 9, 1963,
25 at around 4:45 in the afternoon, the telephone call was made

1 through to Reno, Nevada. The call was made through to the
2 father of Frank Sinatra, Jr.; namely, Frank Sinatra, Sr.
3 Then there are a series of telephone calls. I won't go
4 into detail on each of the calls. They are set forth --
5 a number of them are set forth as overt acts in the first
6 count of the Indictment.

7 On the following morning, 9:05 in the morning, Mr.
8 Irwin again telephoned up to Frank Sinatra, Sr., who was
9 at the Mapes Hotel at that time, talked with Senior, and
10 also allowed Junior to talk to Senior on the telephone at
11 that time. It was during that first call that the victim
12 talked to his father that the statement was made that
13 "We are holding the boy for money.", but no details were
14 given at that time.

15 Then on December 10th, later on in the morning, at
16 11:40, Mr. Frank Sinatra, Sr. was not in his room, but a
17 telephone call came through from Mr. Irwin; and with Mr.
18 Sinatra was a gentleman named Mr. Milton Rudin, Mr. Sinatra's
19 attorney. He took that call, and he gets involved in
20 several other telephone calls.

21 Eventually, a call came through to talk to Mr. Sinatra,
22 Sr., and he was directed to go to a gas station. Now,
23 there is some confusion on these gas station calls.
24 Apparently, in the telephone directory that covers Carson
25 City, it also covers Reno; and one has to be familiar with

1 the book to distinguish which city.

2 Based on a telephone call, Senior was sent to a
3 particular gas station, to a particular phone at that gas
4 station. He apparently went to the wrong one, or else was
5 directed to the wrong one, because then there was a series
6 of calls from Mr. Irwin, first to a gas station asking for
7 Frank Sinatra, Sr., and he was not there. Then calls to
8 the Mapes Hotel and a conversation with Mr. Ruden stating
9 that there had been a mistake; he was sent to Reno when he
10 should have gone to Carson City. Eventually Mr. Sinatra
11 went to the correct gas station in Carson City, at which
12 time Mr. Irwin called him at that gas station. They talked
13 for a matter of a few moments, and the demands were actually
14 made for the delivery of ransom money, and some detail was
15 gone into on ransom money.

16 After talking for a short period of time with Mr.
17 Sinatra, the conversation was not over. Mr. Sinatra was
18 directed to hang up and proceed to another gas station.
19 The first gas station was Ron's. The second gas station
20 he was ordered to proceed to was Oxby's, both of which are
21 in Carson City. Both of those telephone calls, the call to
22 Ron's and the call to Oxby's in Carson City, make up the
23 Counts 4 and 5 in the Indictment. On each of those calls,
24 the specific amount, type of bills, details of that nature
25 were given to Frank Sinatra, Sr. He was also instructed to

1 return to Los Angeles and go to the home of his former wife
2 in Bellair. Mr. Sinatra in fact did. He went to his former
3 wife's home.

4 That takes us down further into overt act 19. On that
5 night, which is still December 10, 1963, just before 9:30,
6 Mr. Sinatra at the Bellair residence received another tele-
7 phone call, this time directing him to go to another gas
8 station. He went to the gas station, received another call,
9 and was advised to have the money and also advised that a
10 courier could take over, and his courier was directed out
11 to the airport terminal. At that stage Mr. Sinatra returned
12 back to the Bellair residence, and a courier acted from that
13 point on for Frank Sinatra, Sr. We have produced the courier,
14 of course, as a witness. He was an FBI Agent by the name of
15 Jerry Crow. He went to the airport out to the Western
16 Airlines Terminal to a predescribed phone location and a
17 predescribed code was used. The code word was used, but
18 this was all given on the prior calls. The code was used.
19 Mr. Crow had to answer a certain way, and then they continued
20 to talk. He was then directed to another gas station where
21 he took another telephone call directly from there to another
22 gas station; and during this period of time Mr. Crow was
23 carrying a valise which, although the demands were for
24 \$240,000 in certain denomination bills, he had in the
25 valise \$239,985. The amount demanded as compared to the

17
1 amount being carried at this stage was \$15 short.

2 At the last described gas station, Mr. Crow was
3 directed to leave the valise in a certain location. The
4 valise was left in that location, and although this started
5 in the early evening around 9:30 in Los Angeles, by this
6 time we have the trip to the gas stations, to the airport,
7 to the series of gas stations, and finally the valise
8 is left off. We have now passed midnight, so we are now
9 on to the next day, which is December 11, 1963.

10 The money in the valise was in fact picked up. All
11 during that period of time, Mr. Irwin -- this period of
12 time when these calls were being made, Mr. Irwin was
13 guarding Frank Sinatra, Jr. over at the 8143 Mason Avenue
14 address. When the money was picked up, Mr. Irwin took Mr.
15 Sinatra, Jr. in his vehicle, a '57 Plymouth, drove it from
16 Mason Avenue, left the victim off unharmed at the offramp
17 of Mulholland Drive off the San Diego freeway. The victim
18 walked from there.

19 Frank Sinatra, Sr. received another phone call. He
20 was advised that his son had been released unharmed. A
21 period of time after that, the father and son were joined
22 together.

23 On the morning of the 13th, which was Friday, December
24 13, 1963, the Defendant Mr. Irwin, acting through his
25 brother down in San Diego, surrendered himself into the

1 custody of the FBI. At that time Mr. Irwin had in his
2 possession just under \$48,000 of the known money that was
3 put in the valise.

4 I might back up for just a moment. I will say \$240,000,
5 asking you to keep in mind that it is actually Fifteen dollars
6 less than that that was put in the valise. Of the money
7 that was put in the valise, certain steps were taken, taking
8 serial numbers, things of that nature, so that the money
9 could be subsequently identified.

10 On the morning of Friday the 13th, when Mr. Irwin
11 surrendered himself into the custody of the FBI, as I say,
12 he had just under \$48,000 of that known money in his posses-
13 sion which he turned over to the FBI at that time. That
14 night, the night of Friday, December the 13th, and into
15 the early morning of Saturday, December the 14th, the
16 Defendants Keenan and Amsler were taken into custody by
17 the FBI, and during that period of time an additional
18 \$168,000 -- I'm using round figures -- was recovered, and
19 this money is also of the known serial numbers that was part
20 of the money put in the valise. Shortly following that,
21 additional amounts of money were recovered in various loc-
22 ations in the City of Los Angeles.

23 The handguns, both guns were recovered by the FBI;
24 one of the guns recovered here in Los Angeles, another one
25 of the guns was recovered by the FBI alongside of a road

up in Nevada apparently in the vicinity of where the road-block was. That gun will be produced as well as the agents who found the gun, where they found it, how they found it.

Documentary evidence will be introduced; foundation type documents, phone installations, where installed, under what name, telephone records showing telephone calls being made, particularly long distance calls. We will be able to show, for instance, that the telephone calls that were made to Sinatra, Sr. and some taken by his attorney, Mr. Rudin, up in Reno and in Carson City, that those calls were all made from 8143 Mason Avenue, Canoga Park, California. So we will have records of that type; hotel records, telephone company records, automobile leasing records. We will have the guns, we will have expert testimony, and we will have testimony of people who knew and dealt with the defendants during this case.


I will wrap it up, if I may, by making one statement, a statement I have already made, actually; that there are six counts in the Indictment. In each of the six counts, there are essential elements, there are material allegations, all of which, of course, the defendants, by their plea of not guilty, put in issue. It is the Government's intention to prove each and every essential element of each of the six counts charged in the Indictment.

Thank you, Your Honor.

20
REPORTER'S CERTIFICATE

1
2
3 I, the undersigned, Joseph F. McCloskey, Jr.,
4 Official Court Reporter of the United States District Court,
5 for the District of Oregon, do hereby certify that on the
6 date set forth on the title page of this transcript, I
7 reported in stenotype the proceedings occurred in the tran-
8 script appended hereto; that I thereafter caused my steno-
9 type notes to be reduced to typewriting under my direction,
10 and that the foregoing transcript, consisting of Pages 2
11 to 19, both inclusive, constitutes a full, true and accurate
12 transcript of said proceedings so reported by me on said
13 dates as aforesaid.

14 Dated at Portland, Oregon, this 22 day of
15 May, 1967.

16
17 
18 JOSEPH F. McCLOSKEY, JR.
19 Official Court Reporter
20
21
22
23
24
25

APPENDIX "A"

Before the case went to trial the fact that this was a noncapital case was thoroughly understood between the United States Attorney, defense counsel, and the trial judge.

Three weeks before trial commenced defense counsel stated to the court that "As far as the facts of the particular offense that is alleged, we know that the kidnaped was returned unharmed . . ."; that "there has been no injury to anyone involved in this matter . . .". The United States Attorney stated to the court that "The crimes charged in this indictment are . . . extremely serious. There is a possible life sentence that is involved in at least one count of this indictment." R. T. January 20, 1964, pp. 72-77. Defense counsel again during pre-trial proceedings in connection with a bail reduction motion advised Judge East that no one was physically injured and the prosecutor advised the court as follows: "Now, the offense charged . . . is an offense that carries a possible life sentence . . . a capital offense would be the only crime that would be more serious." Vol. II, Motion to Suppress, pp. 304-312 (emphasis added). The trial judge was also apprised before trial that no possibility of a death sentence was involved in the case not only by virtue of the clear understanding of all counsel and the court as above stated but by the silence of all defense counsel with respect to invoking any application of Section 3432 (see Amsler's Motion for Reduction of Bail January 22, 1964, p. 3, Ex. 61, pp. 17, 19, 21) and by advice to the court by defense counsel in which they indicated their position that the benefits of Section 3432 were not sought. Thus, Amsler's counsel, when Judge East heard Irwin's motion for the right

to inspect the prospective jury list, stated to the court " . . . Well, Your Honor, the practice of the jury list has varied from district to district. . . . However, it is a matter of discretion. . . ." (emphasis added) R. T. January 20, 1964, p. 28. When the court directed the Government to provide a list of witnesses Government counsel, responsive to a request of the defense, not under Section 3432 but under Brady v. Maryland, the following colloquy occurred between Government counsel and the court with respect to the witness list:

"Mr. Sheridan: Your Honor, I might say that the court's offer of pre-trial here is . . . not compulsory. I mean there is no statute that compels the court to do it.

"The Court: We certainly have no statute about it."

Vol. IV R. T. January 31, 1964, pp. 510 lines 22-25; see also pp. 504-509; 511-515; emphasis added).

Although the entire record was designated by counsel on appeal, apparently the Government's opening statement was never transcribed or included in the record on appeal. The prosecutor stated:

"When you were sworn in as jurors and when you were first called as prospective jurors, the Court outlined to you in general the Indictment. I am going to take this moment to read the Indictment to you, because it is the Government's intention to prove each and every essential allegation and each of the six counts of the Indictment."

He read the indictment, including Count Two, to the jury and

after his stating that an opening statement is " . . . a statement of . . .
what it is anticipated will be proved by that side of the lawsuit. So
what I am about to tell you in general terms is what the Government
anticipates the proof to be in the case." The prosecutor told the jury
that defendant Irwin " . . . left the victim off unharmd at the offramp
of Mulholland Drive". . . and that "Frank Sinatra, Sr. received another
phone call. He was advised that his son had been released unharmd
. . ." (Government's opening statement at pp. 1, 6, 9, 17. The full
text of the opening statement is attached hereto as Appendix A-1).

APPENDIX "B"

Irwin and Amsler received a list of witnesses five days before trial and the list of veniremen the day of trial [R. T. February 5, 1964, pp. 7-18; February 10, 1964, p. 94]. To suggest substantial prejudice would be to speculate that a conscientious jury did not follow the court's instructions and forms of verdict which, together with the pre-trial and trial record, completely confirm Judge East's "informed decisions" before the trial started to conduct the trial as a non-capital case [T.S. 4246-4247, 4275-78; C. T. 182, 329; Ex. 160; Testimony of Sinatra, Jr. R. T. 626. See also Vol. 18 R. T. 4114, line 25, 4117, lines 1-5; 4124, 4126-4127, 4131, 4138, 4162, 4184-4185. See Appendix "A" and A-1].

No. 19914

IN THE
UNITED STATES
COURT OF APPEALS
For the Ninth Circuit

SEATTLE STEVEDORE COMPANY,
Appellant,

vs.

COMPANIA MARITIMA and MARITIME
COMPANY OF THE PHILIPPINES,
Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
IN ADMIRALTY

APPELLANT'S PETITION FOR
REHEARING

BROZ, LONG, MIKKELBORG,
WELLS & FRYER
JACOB A. MIKKELBORG
DOUGLAS M. FRYER
Proctors for Appellant

912 Logan Building
Seattle, Washington 98101

PRATT PRINTING COMPANY  SEATTLE, WASHINGTON

FILED

FEB 3 1957

WM. B. LUCK, CLERK

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COMPANY OF THE PHILIPPINES,
Appellees.

No. 19914

**APPELLANT'S PETITION FOR
REHEARING**

The Court's opinion dated January 27, 1967, apparently holds that, merely because appellee's ship was found unseaworthy in litigation based upon a longshoreman's claim for personal injuries, the stevedore contractor, appellant here, breached his warranty of workmanlike service.

The trial court made no findings that appellant's equipment was deficient, or that appellant negligently or otherwise failed in performance, or that the method of handling cargo was improper or unreasonably unsafe. Furthermore, there is no credible evidence to support any such finding.

Liability can be imposed, on the present record, only because an accident occurred while appellant stevedore contractor was in charge of the loading activity, *regardless of the suitability of his performance* — this would make appellant stevedore an insurer.

Respectfully submitted,

BROZ, LONG, MIKKELBORG,
WELLS & FRYER

By

F. Broz & L. Mikkelborg
Proctors for Appellant

February 7, 1967

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this application for a rehearing, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing petition is well founded and that it is not interposed for delay.

I also certify that this petition has been served on all adverse parties herein.

DOUGLAS M. FRYER
Proctor for Appellant

February 7, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOW HERBERT and NANCY HERBERT,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

RESPONDENT'S SUPPLEMENT TO HIS ORIGINAL PETITION FOR
REHEARING AND FOR CLARIFICATION OF OPINION

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WAT 261967

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FILED

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19,935

BOW HERBERT and NANCY HERBERT,

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Respondent

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RESPONDENT'S SUPPLEMENT TO HIS ORIGINAL PETITION FOR
REHEARING AND FOR CLARIFICATION OF OPINION

To the Honorable, the United States Court of Appeals for the Ninth
Circuit and the Judges Thereof:

Comes now the Commissioner of Internal Revenue, the respondent in the above-entitled cause, by his attorneys, and acting on the permission granted by this Honorable Court in the concurring opinion of Circuit Judge Merrill, filed April 24, 1967, and in the light of said opinion and of the dissenting opinion of District Judge Tavares, filed April 4, 1967, (both dated subsequent to the date of the filing of the respondent's original Petition for Rehearing and for Clarification of Opinion herein), respectfully requests that the following supplementary points or reasons be added, at the place indicated, to his Original Petition for Rehearing and for Clarification of Opinion:

1. On page 5, after line 9, add:

5. On the assumption that the partners had agreed during the taxable years to the taxpayer's withdrawal of the funds in issue from the partnership and their deposit in the "Bow Herbert Personal Account", and on the further assumption that the taxpayer made the secret payments to undisclosed recipients (neither

of which assumptions, we submit, is supported by the record), Circuit Judge Merrill concluded (Slip Concurring Op. 2) that the basic question presented was whether the owners of the business or the individual who is directly responsible for making the payments should bear the tax consequences of the fact that such payments were not deductible. Casting the issue in these terms is unsound not only because the factual premises are erroneous but also because it conflicts with the cases decided by this Court and other courts, cited above, (see also Wilson v. United States and Nelms v. United States, consolidated, (M.D. Tenn.), decided August 25, 1965 (16 A.F.T.R. 2d 5608)) which show that it is incumbent on a taxpayer receiving funds under the circumstances of this case to make a disclosure of what he did with those funds. Otherwise, he has not met the burden of proof incumbent upon him. One of the consequences of Circuit Judge Merrill's analysis would be, in the case of an exempt organization, such as a union, if an individual were authorized to make secret payments to undisclosed recipients, under the theory advanced by Circuit Judge Merrill, neither the exempt organization nor the individual distributing the funds would be taxable where the individual spent the money for personal purposes but declined to account for the expenditure.

6. We further respectfully submit that Circuit Judge Merrill's concurring opinion has erred in giving weight to the so-called "1961 settlement" agreement (see Slip Concurring Op. 2) as establishing that the owners of the business rather than the taxpayers should bear the tax consequences of the amounts here in issue which the taxpayer withdrew from the partnership and added to his "Bow Herbert Personal Account" without any accounting therefor. As District Judge Tavares' dissenting opinion points out (Slip Dissenting Op. 8-10), the record fails to show the existence during the taxable years ending September 30, 1958, September 30, 1959, and September 30, 1960, of an "agreement between all the partners purporting to authorize * * * [the taxpayer's] secretive practices and expenditures". The so-called "1961 settlement" agreement was entered into after the years here in issue before this Court. The Tax Court, we respectfully submit, properly did not consider its effect on the issue before this Court. Moreover, as discussed by District Judge Tavares in his dissenting opinion (Slip Dissenting Op. 10), there is great doubt as to the arms'-length nature of this so-called "1961 settlement" agreement between the taxpayer and his partners. After discussing various aspects of the so-called "1961 settlement" District Judge Tavares justifiably states (Slip Dissenting Op. 10), "In other words, Bow Herbert in effect bought them out and stifled their objections to non-disclosure by making huge concessions in other respects."

2. On page 5, the concluding paragraph of the original Petition for Rehearing and Clarification of Opinion should be deleted and the following inserted:

Wherefore, in view of the foregoing, the Commissioner respectfully requests that his original Petition for Rehearing, as supplemented herein, be granted by this Honorable Court, and that the majority and concurring opinions filed, respectively, on December 30, 1966, and April 24, 1967, and the judgment entered April 24, 1967, in this cause be vacated and set aside, and that a rehearing be granted; and further, the Commissioner respectfully requests that the opinions of this Court heretofore filed be clarified in the respects set forth above.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
CAROLYN R. JUST,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

May, 1967

CERTIFICATE OF COUNSEL

The undersigned, attorney for the Commissioner of Internal Revenue, respondent herein, hereby certifies that the foregoing Supplement to the Commissioner's original Petition for Rehearing and for Clarification of Opinion, is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

MITCHELL ROGOVIN,
Assistant Attorney General.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOW HERBERT and NANCY HERBERT,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

RESPONDENT'S PETITION FOR REHEARING AND
FOR CLARIFICATION OF OPINION

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MAR 20 1967

MITCHELL ROGOVIN,
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LEE A. JACKSON,
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CAROLYN R. JUST,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

FOR THE NINTH CIRCUIT

No. 19,935

BOW HERBERT and NANCY HERBERT,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

RESPONDENT'S PETITION FOR REHEARING AND
FOR CLARIFICATION OF OPINION

To the Honorable, the United States Court of Appeals for the Ninth
Circuit and the Judges Thereof:

Comes now the Commissioner of Internal Revenue, the respondent in the above-entitled cause, by his attorneys, and presents this, his petition for a rehearing and for clarification of opinion, in the above-entitled cause in which an opinion and judgment were rendered on December 30, 1966, by this Court (Circuit Judges Jertberg and Merrill), with District Judge Tavares dissenting.

The Commissioner respectfully submits that the majority opinion fell into error in the following respects:

1. The majority opinion states (Slip Op. 7):

The general rule is that the burden of proof is on the Commissioner to establish that the taxpayer received income. However, the Commissioner's determination of a deficiency satisfied such burden since the determination made by the Commissioner is presumptively correct. The taxpayer then has the

burden of overcoming this presumption by a preponderance of the evidence. American Pipe and Steel Corp. v. Commissioner, 243 F. 2d 125 (9th Cir.), cert. denied, 355 U.S. 906 (1957). When the taxpayer has overcome the presumption by competent and relevant evidence, the presumption disappears and drops out of the case. J. M. Perry Co. v. Commissioner, 120 F. 2d 123, 124 (9th Cir. 1941); Clark v. Commissioner, 266 F. 2d 698, 706 (9th Cir. 1959); Cohen v. Commissioner, 266 F. 2d 5 (9th Cir. 1959); Hemphill Schools, Inc. v. Commissioner, 137 F. 2d 961 (9th Cir. 1943).

While the respondent recognizes that the statement made in the first sentence of the excerpt quoted above is qualified by and must be read in context with the remainder of the paragraph in which it is set forth, namely, that the taxpayer has to overcome the presumption of correctness in favor of the Commissioner by a preponderance of the evidence before the duty of going forward with the evidence shifts to the Commissioner, statements in later portions of the opinion lend confusion and uncertainty with respect to the true meaning of the majority opinion in this connection. Thus we respectfully submit that the majority would appear to be in error when it subsequently states (Slip Op. 9):

The burden of proof was not upon the taxpayer to show that he had no income. The burden was upon the Commissioner to establish that the taxpayer received the money as income. It appears to us that the Tax Court has confused the burden of establishing receipt of income with the burden of supporting allowable deductions from income. In the former case the burden is on the Commissioner, and in the latter case the burden is upon the taxpayer.

A similar statement is made by the majority at page 10, lines 6-9:

In our view the Tax Court erred in placing the burden of proof on the taxpayer to establish that he had no income instead of placing upon the Commissioner, where it belonged, the burden of establishing that petitioner realized income.

These last two excerpts from the majority opinion suggested that the majority is adopting a position as to the burden of proof in cases of this type 1/ which conflicts with this Court's prior opinions in American Paper & Steel Corp. v. Commissioner, 243 F. 2d 125; Todd v. Commissioner, 153 F. 2d 553; and Lawrence v. Commissioner, 143 F. 2d 456; and with opinions of other courts in Welch v. Helvering, 290 U.S. 111, 115; Thrower v. Commissioner, 330 F. 2d 614 (C.A. 5th), affirming, per curiam, decision of December 11, 1962 (P-H Memo T.C., par. 62,291); United Aniline Co. v. Commissioner, 316 F. 2d 701, 704 (C.A. 1st); O'Dwyer v. Commissioner, 266 F. 2d 575, 578 (C.A. 4th); Polizzi v. Commissioner, 265 F. 2d 498, 501-502 (C.A. 6th); Hoefle v. Commissioner, 114 F. 2d 713, 714, 715 (C.A. 6th). See also 9 Mertens, Law of Federal Income Taxation (Rev.), Sec. 50.61; IX Wigmore on Evidence (3d ed.), Secs. 2489 and 2540; Rule 32, Rules of Practice of the Tax Court of the United States (Rev. 1958, 1964 ed.). For indications of the confusion apparently resulting from the conflicting statements by the majority see 12 Roehner on Federal Taxation, No. 1, dated January 13, 1967; 1967 P-H Federal Taxes Report Bulletin of February 9, 1967, par. 60,055.

In view of the foregoing, the Commissioner respectfully prays that a clarification of the opinion in this respect might be made.

2. Although the majority states (Slip Op. 8) that it does not base its determination on testimony of the taxpayer which the Tax Court characterized as incredible, it is respectfully submitted that, aside from

1/ Contrary to the situation here, the Commissioner would, of course, initially have the burden of proof (1) in fraud cases, pursuant to sec. 7454 of the Internal Revenue Code of 1954; (2) in transferred cases, pursuant to sec. 6902 of the 1954 Code; and (3) where he affirmatively pleads new matter. 9 Mertens, Law of Federal Income Taxation, secs. 50.64 -50.69.



11B241957

**In the United States Court of Appeals
for the Ninth Circuit**

**VIRGINIA HEINZ AND UNITED STATES OF AMERICA,
APPELLANTS**

v.

C. S. HEINZ, JR., ENTERPRISES, ET AL., APPELLEES

**On Appeal from the Order of the United States District
Court for the Southern District of California**

BRIEF FOR THE UNITED STATES

MITCHELL ROGOVIN,

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FILED

FEB 23 1967

WM. B. LUCK, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 19,984

VIRGINIA HEINZ AND UNITED STATES OF AMERICA,
APPELLANTS

v.

C. S. HEINZ, JR., ENTERPRISES, ET AL., APPELLEES

On Appeal from the Order of the United States District
Court for the Southern District of California

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court wrote no opinion. Its oral opinion (V-R. 31-36)¹ and order affirming the order and adopting the findings of the referee (I-R. 141-144) are not officially reported.

JURISDICTION

This proceeding involves separate appeals by Virginia Heinz and the United States. On January 28, 1964, C. S. Heinz, Jr., Enterprises, a limited partner-

¹ I-R-V-R. references are to Volumes I-V of the record on appeal.

ship, and Clifford S. Heinz, Jr., individually and as a general partner, filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, as amended. (I-R. 2-18.) Pursuant to Sections 22 and 331 of the Bankruptcy Act, as amended, the proceeding was referred to a referee in bankruptcy. (I-R. 2, 19.) In March and April, 1964, the Internal Revenue Service made a jeopardy assessment of income taxes asserted to be owing by Heinz and his wife, Virginia, for 1956 of interest (Ex. 12) and for F.I.C.A. taxes owed by Heinz and the partnership for the fourth quarter of 1963 (Ex. 13), filed notices of its tax liens in Pennsylvania and California (Exs. 14, 15, 16), and levied upon the Pennsylvania trustee of spendthrift trusts of which Heinz is the income beneficiary (Ex. 11).²

In the meantime, in April and October, 1963, Virginia Heinz brought attachment proceedings in a Pennsylvania State court against her husband's interests in the spendthrift trusts to satisfy an unpaid judgment awarded to her by the California state court for temporary alimony and child support. (Exs. 1A-H, 2A-F, 3A-B.) The United States intervened in the Pennsylvania State court proceedings.

In response to applications by the receiver and Heinz (I-R. 20-24, 25-26, 27-31, 46-50), the referee in the arrangement proceedings on September 18,

² Pursuant to a stipulation between the United States, Heinz and his wife, the Tax Court on December 2, 1964, entered a decision determining a deficiency in income taxes for 1956 of \$162,366.52 plus interest. There is no dispute between the parties that the amount of F.I.C.A. taxes owing is \$131.26.

1964, ordered the receiver to administer Heinz' interests in the spendthrift trusts as assets of the arrangement estate free of and superior to the claims of Heinz, his wife and the United States, and restrained the United States, Virginia Heinz and Heinz from proceeding in the Pennsylvania State court with the attachment proceedings and from asserting any claim, e.g., for taxes or alimony and child support, against the trustee of the spendthrift trust inconsistent with the referee's order. (I-R. 87-94.)

Within the extended period granted by the referee under Section 39c of the Bankruptcy Act, as amended (I-R. 95-98, 112-113), timely petitions for review of the referee's order by the District Court were filed by Virginia Heinz on October 15, 1964 (I-R. 99-102, 111), and by the United States on October 19, 1964 (I-R. 114-116, 125). Pursuant to jurisdiction allegedly conferred upon it by 28 U.S.C., Section 1334, and Section 23 of the Bankruptcy Act, as amended, the District Court entered its order and amended order on February 3, 1965, and February 18, 1965, respectively, affirming the order of the referee. (I-R. 141-144.) Within sixty days thereafter, on March 3, 1965, Virginia Heinz and the United States filed separate notices of appeal. (I-R. 224-225, 233-235.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291, and Section 24 of the Bankruptcy Act, as amended.

QUESTION PRESENTED

Whether a federal tax lien and levy upon a taxpayer's income interest in a state-protected spend-

thrift trust is precluded by Chapter XI bankruptcy proceedings.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954, the Bankruptcy Act, as amended, are set forth in the Appendix, *infra*.

STATEMENT

The individual debtor, Clifford S. Heinz, Jr., is a beneficiary of two spendthrift trusts created in Pennsylvania by a Pennsylvania settlor and administered by a Pennsylvania trustee. (I-R. 88.)³ Together with his two sisters Heinz is an income beneficiary for life of a spendthrift trust created in 1937 by his stepmother. Only the income from this trust is available to him, and he does not have any right to the trust corpus. (Ex. 5.) In addition, Heinz and his two sisters each have a one-ninth interest in the income of a spendthrift trust created by their stepmother in 1948. The income from this trust terminates at their stepmother's death. (Ex. 6.)⁴

³ In the proceedings below the referee found (I-R. 88) that Heinz was the beneficiary of three spendthrift trusts created in 1929, 1937 and 1948. However, an examination of the trust agreements (Exs. 4, 5 and 6) indicates that only the 1937 and 1948 trusts had spendthrift provisions, and that Heinz possessed only a remainder interest in the 1929 trust.

⁴ The 1948 spendthrift trust was carved out of a testamentary trust created in 1935 by Heinz' father in which Heinz' stepmother received the income for life, but the voting rights in the shares of stock comprising the corpus of the trust were

Heinz and his wife were involved in divorce proceedings in California. In October, 1962, the California State court ordered him to pay \$3,500 a month to his wife for temporary alimony and child support. Apparently Heinz became delinquent in making these payments. (I-R. 88-89.) Accordingly, in 1963 Virginia Heinz brought two foreign attachment actions in the Court of Common Pleas of Allegheny County, Pennsylvania, to collect from the 1948 and 1937 spendthrift trusts \$24,475 allegedly owing to her for support for the period from November, 1962, to March, 1963, and to impose a continuing lien on the income accruing to Heinz from both trusts until his liability arising under the California judgment became discharged. (I-R. 88; Exs. 1A-H, 2A-F, 3A.) Thereafter, in August, 1963, Heinz and his wife stipulated and the California State court ordered (R. 89; Ex.

assigned to a brother of the decedent. Two nephews of the decedent were remainder beneficiaries. The 1948 spendthrift trust was established by Heinz' stepmother, whereby she assigned for her lifetime one-third of her income in the testamentary trust to Heinz and his two sisters. (Ex. 6.)

Although it is not part of the record in this proceeding, it appears that one of the remaindermen of the 1935 testamentary trust predeceased the life tenant, Heinz' stepmother, without leaving lineal descendants. A settlement was reached by various members of the Heinz family whereby Heinz and his two sisters obtained a remainder interest in the deceased nephews' share.

Heinz and his two sisters each have a one-third vested remainder interest in a trust created in 1929 by their father, in which their mother is the life beneficiary. (Ex. 4.) Heinz does not have any present right to the income from this trust during the lifetime of his mother. Apparently, this is the trust which the referee mistakenly held (I-R. 88) to be spendthrift.

3B) a reduction in temporary alimony and child support payments to \$2,500 per month, commencing November 1, 1963; the trustee of the spendthrift trusts was authorized to release to Heinz' wife accrued and unpaid trust income and future trust income in a total amount of \$42,000 to satisfy the California judgment, and certain additional amounts were awarded out of the trust income for attorneys' fees and unpaid rentals. The Pennsylvania State court proceedings brought by Virginia were to be continued until after January, 1964, and the parties agreed not to delay the California divorce proceedings.⁵

On January 28, 1964, Heinz and the partnership, C. S. Heinz, Jr., Enterprises, filed a petition for an arrangement under Section 322 of Chapter XI of the Bankruptcy Act. (R. 2-18, 89).⁶

⁵ In compliance with the stipulated order, it appears that the amounts payable through January, 1964, were in fact paid in full by the trustee to Virginia Heinz and her attorneys. The referee found on this point as follows (I-R. 88):

9. After compliance with the said stipulated Order in said California divorce action of August 30, 1963, the first delinquency by said HEINZ in payment of child support and alimony under the said Order of October 18, 1962 occurred in connection with the payment due on February 1, 1964, which delinquency, among other subsequent delinquencies, continues to the present time.

10. As of the date of the filing of the Petition in Bankruptcy herein, to wit, January 28, 1964, HEINZ was not in default in payment of alimony and child support under the said California divorce action Order dated October 18, 1962.

None of the parties have questioned these two findings.

⁶ The partners of C. S. Heinz, Jr., Enterprises, appear to be Heinz and his wife and certain members of his family, in-

Previously, the Internal Revenue Service had issued a 90-day statutory notice of deficiency for income taxes owing by Heinz and his wife, Virginia, for 1956 in the amount of \$330,919.77, plus \$137,145.84 of interest, for a total amount of \$468,065.61, from which the taxpayers filed a petition with the Tax Court. On March 13, 1964, approximately one and one-half months after the arrangement petition had been filed, the Service made a jeopardy assessment against Heinz and his wife for the income taxes and interest. (I-R. 89-90, Ex. 12.)⁷ On March 27, 1964, the Service assessed withholding of income and F.I.C.A. taxes for the fourth quarter of 1963 alleged to be owing by the partnership and Heinz in the net amount of \$131.26. (I-R. 89-90; Ex. 13.) Notices of federal tax liens in the amount of \$468,211.10⁸ were filed with the Recorder of Deeds in Allegheny

cluding his mother, two sisters and a family trust, of which Heinz is trustee. Heinz individually is the general partner.

⁷ Heinz and his wife filed a joint income tax return for 1956, and the certificate of assessment lists Heinz and his wife as the taxpayers. (Govt. Ex. 12.)

⁸ The notices of federal tax liens comprised the following amounts (Exs. 14, 15, 16):

<u>Class of Tax</u>	<u>Taxable Period</u>	<u>Description</u>	<u>Amount</u>	<u>Total</u>
Income	1956	Deficiency in tax	\$330,919.77	
		Pre-arrangement interest	<u>137,145.84</u>	
				\$468,065.61
WT-FICA	4Q63	Balance due in tax		131.26
FICA	4Q63	Additional tax		14.23
		Total		<u>\$468,211.10</u>

County, Pennsylvania, on April 7, 1964 (Ex. 14), with the Clerk of the District Court for the Western District of Pennsylvania on April 15, 1964 (Ex. 15), and in Los Angeles County, California, on April 7, 1964 (Ex. 16). On April 15, 1964, the Service filed a notice of levy upon the Mellon National Bank & Trust Company, trustee of the 1937 and 1948 spendthrift trusts, for \$469,749.47. (I-R. 90-91; Ex. 11.)⁹

In the meantime, early in 1964, the receiver and Heinz filed petitions with the referee for temporary stays of the California divorce proceeding and the Pennsylvania attachment proceedings pending confirmation of the arrangement proceeding. (I-R. 20-24, 27-29.)

⁹ The notice of levy comprised the following amounts (Ex. 11):

<u>Class of Tax</u>	<u>Taxable Period</u>	<u>Description</u>	<u>Amount</u>	<u>Total</u>
Income	1956	Deficiency in tax	\$330,919.77	
		Pre-arrangement interest	137,145.84	
		Penalty	1,536.94	
				\$469,602.55
WT-FICA	4Q63	Balance due in tax	131.26	
		Penalty for failure to make a timely deposit	1.43	
				132.69
FICA	4Q63	Additional tax		14.23
			Total	\$469,749.47

Pursuant to authorization of the referee, it was stipulated by the receiver and the United States that the taxpayer's deficiency in income taxes for 1956 was \$162,366.52, plus statutory interest. (I-R. 131.) The Tax Court entered a decision to this effect on December 2, 1964.

On March 28, 1964, and on May 15, 1964, Heinz proposed in writing to the referee that he be permitted to pay out of the income from the spendthrift trusts \$12,000 a year to his wife, plus \$12,000 a year to himself, and the balance of this income to the arrangement estate for distribution to his creditors in their order of priority. This proposal was conditioned upon acceptance of his proposed plan of arrangement. (I-R. 91; Exs. 9, 10.)

In response to an application filed by the receiver (I-R. 46-50), the referee on September 18, 1964, held (I-R. 91-92) that the debtor's interest in the spendthrift trusts constituted property which vested in the arrangement estate free of and superior to any claim of Heinz, his wife ¹⁰ and the United States, on the grounds that prior to the filing of the petition for an arrangement under Chapter XI, i.e., on January 1, 1964, the United States as a creditor of Heinz could have assessed \$385.73 of unpaid F.I.C.A. taxes for the fourth quarter of 1963, or because Heinz had offered to subject his interest in the spendthrift trusts to payment to his creditors. The referee held that since the notices of federal tax liens had been filed and the levy had been made after the filing of the petition for an arrangement, they were of no force or effect as against the receiver. Holding that the taxpayer's interests in the spendthrift trusts were subject to the

¹⁰ The referee's holding that the receiver's interest in the trust proceeds was superior to that of Virginia Heinz presumably was based upon his finding that Heinz was not in default in alimony and child support payments when he filed the petition for an arrangement. (I-R. 89.)

exclusive jurisdiction of the arrangement estate, the referee restrained Heinz, his wife and the United States from proceeding with the Pennsylvania attachment actions and from asserting any claims against the trustee of the 1937 and 1948 trusts inconsistent with the referee's order. Heinz and his wife also were restrained from seeking payment of alimony, child support and attorneys' fees or proceeding further with the California divorce proceeding insofar as these affected payment out of the spendthrift trusts. Upon petitions for review filed by Virginia Heinz (I-R. 99-102) and the United States (I-R. 114-116, 125), the District Court affirmed the order of the referee (I-R. 141-144). Virginia Heinz (I-R. 224-225) and the United States (I-R. 233-235) have appealed the District Court's order to this Court.¹¹

SPECIFICATION OF ERROR RELIED UPON

The arrangement court erred in holding that a federal tax lien and levy upon a taxpayer's income interest in a state-protected spendthrift trust is precluded by Chapter XI arrangement proceedings.

¹¹ In addition to the present litigation and the pending Pennsylvania attachment suits and the California divorce actions there are other proceedings presently pending in the Orphans' Court of Allegheny County, Pennsylvania, wherein Heinz, his wife, the receiver and the United States, as well as others, are claiming payment out of the spendthrift trust funds. Upon a petition by the United States, the Orphans' Court on December 15, 1964, suspended distribution of the trust funds (with certain limited exceptions not in issue) and postponed an adjudication of the rights of the parties to the funds until a final determination is made in the present proceeding.

SUMMARY OF ARGUMENT

Under Pennsylvania law, absent bankruptcy, the general creditors of the taxpayer could not reach his interest in the spendthrift trust income. The liability of a spendthrift trust for federal taxes has only a limited effect upon a spendthrift trust and does not destroy its exempt status as to other creditors. Section 6 of the Bankruptcy Act expressly preserves exemptions created or protected by state *or* federal law, and Section 70a provides that exempt property does not become part of a bankruptcy estate. Since a spendthrift trust is completely exempt under state law from the claims of general creditors, this property is wholly exempt from the jurisdiction of a bankruptcy court, and the latter has no jurisdiction to enjoin a federal tax levy upon the spendthrift trust income of the taxpayer.

Moreover, Sections 311 and 314 of Chapter XI of the Bankruptcy Act neither confer jurisdiction over exempt property to an arrangement court nor enable an arrangement court to defeat the Congressionally enacted policy to protect state exemptions from the reach of creditors; rather, these provisions merely enable an arrangement court to obtain exclusive jurisdiction over property of the debtor which passes to and becomes part of the arrangement estate.

ARGUMENT

A Federal Tax Lien and Levy Upon a Taxpayer's Income Interest In a State-Protected Spendthrift Trust Is Not Precluded by a Chapter XI Bankruptcy Proceeding Since Such Property Is Exempt and Not Within the Jurisdiction of the Bankruptcy Court

The interest of the taxpayer, Clifford S. Heinz, in a spendthrift trust was created and is being administered under the laws of Pennsylvania. Pennsylvania law fully protects a spendthrift trust from the reach of general creditors of the beneficiary. *In Hays' Estate*, 201 Pa. 391, 50 A. 775; *In re Estate of Martin Dixon*, 101 Pa. Super. 152, affirmed, 306 Pa. 261, 159 A. 442; *In re Heyl's Estate*, 50 A. 775; *In re Beck's Estate*, 19 A. 302; *In re Coe's Estate*, 23 A. 383. It is thus clear that under Pennsylvania law, absent bankruptcy, the general creditors of Clifford Heinz could not reach his interest in the spendthrift income, either by any process of law afforded to creditors or by any voluntary assignment on the part of the beneficiary.

The Federal Bankruptcy Act does not enlarge upon creditors' rights so as to provide a means of defeating state-protected exemptions by recourse to either voluntary or involuntary bankruptcy proceedings. On the contrary, both Sections 6 and 70a of the Bankruptcy Act, as amended, Appendix, *infra*, expressly preserve such state law exemptions. These provisions are obviously necessary since otherwise the state exemptions would be nullified. The elementary principles of the federal-state relations involved are well stated in Scott, Spendthrift Trusts and the Conflict

of Laws, 77 Harv. L. Rev. (1964), 845, 860, as follows:

If by the law of the state which is applicable the interest of the beneficiary cannot be transferred by him and cannot be reached by his creditors, whether because of a state statute so providing or because of a provision in the terms of the trust, it cannot be reached by the trustee in bankruptcy. In *Allen v. Tate* a testator died domiciled in Pennsylvania creating a trust to be there administered under which a beneficiary was entitled to the income and ultimately to the principal. It was provided in the will that no part of the income or principal should be assignable or reachable by creditors. The will was probated in Pennsylvania. In a proceeding brought in a federal court in Missouri the beneficiary was declared bankrupt. The referee made an order of sale of the beneficiary's interest under the trust. The court held that the order should be set aside. It held that the trustee in bankruptcy could not reach the beneficiary's interest, since under the law of Pennsylvania, where the testator was domiciled at death and where the trust was administered and the property located, it could not be assigned or reached by creditors.

This policy is fully applicable to a Chapter XI proceeding, as well as any other bankruptcy proceeding. Chapter XI of the Bankruptcy Act does not grant the arrangement court jurisdiction over exempt property; rather it expressly provides that the exclusive jurisdiction of the bankruptcy court in arrangement proceedings must be consistent with the other provisions of the bankruptcy statute. It is, we think, amply

clear that the property of the debtor to which the provisions of Section 311 and 314 of the Bankruptcy Act, as amended, Appendix, *infra*, apply is property of the debtor subject to bankruptcy administration, and nothing in either Sections 311 or 314 authorizes the arrangement court to defeat the policy which protects state exemptions from the reach of creditors, whether by involuntary process or voluntary assignment.

The decision below, which is directly repugnant to the foregoing settled principles, rests upon the Referee's Conclusion of Law No. 1:

1. The Debtor's interests in the said spendthrift Trusts described in Finding of Fact No. 2 above constitute property which, prior to the filing of the Chapter XI Petition herein, could have been levied upon and sold under judicial process against him by the United States of America for unpaid taxes, or otherwise seized, impounded or sequestered by the United States of America for unpaid taxes.

But this rationale is fallacious. It is settled, as this Court has held, that spendthrift trust income, though exempt under state law from creditors, is not exempt from federal tax liability, since exemptions from federal tax are wholly matters of federal and not state law. Indeed, we think the case here is controlled by *Leuschner v. First Western Bank and Trust Co.*, 261 F. 2d 705 (C.A. 9th). In that case, as here, after the adjudication of the taxpayer in voluntary bankruptcy proceedings, and after the Government had filed a claim for its tax debt in those proceedings, the Government filed a lien and levied upon the bank-

rupt taxpayer's interest in a spendthrift trust for his education and support. This Court noted that the spendthrift trust is simply a statute of exemptions under California law and that (p. 708) "the paramount right to collect taxes of the federal government overrides a state statute providing for exemptions." The taxpayer in *Leuschner* conceded that the spendthrift trust could not be reached by his bankruptcy creditors but insisted that the tax lien and levy could not reach his personal interest in the spendthrift trust, which the bankruptcy court should protect for him by setting this interest aside for his benefit. But this Court held that (p. 708) "the filing of the notice of levy and seizure after the adjudication seems to preclude any jurisdiction over the lien by the bankruptcy court." It can hardly be argued that the instant case can be distinguished from *Leuschner* on the ground that here the general creditors, rather than the protected beneficiary, are seeking to protect the spendthrift trust against a federal tax lien and levy.

The liability of the spendthrift trust for federal tax is thus a limited liability which does not destroy its state-protected exemption from all other creditors. In this respect the federal tax liability has only the same limited effect as state-created exceptions from the protection of the spendthrift trust, as, e.g., payments for the support of a separated wife and children. Both liabilities create only specified exceptions, neither destroys the spendthrift trust.

Since the spendthrift trust is not part of the bankruptcy estate, it follows that the bankruptcy court

had no jurisdiction to enjoin the federal levy upon the spendthrift trust interest of the taxpayer. This proposition, too, has been long settled by *Lockwood v. Exchange Bank*, 190 U.S. 294. The Supreme Court there held (pp. 299-300) :

In other words, it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not.

We think that the terms of the bankruptcy act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt generally exempted by state laws should remain in the bankrupt and not pass to his representative in bankruptcy, as did the provisions of the act of 1867, considered in *In re Bass*. The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in

unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is besides shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is erroneous and should be reversed and the injunction vacated.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
JOSEPH KOVNER,
KARL SCHMEIDLER,
*Attorneys,
Department of Justice,
Washington, D. C. 20530.*

Of Counsel:

JOHN VAN DE KAMP,
United States Attorney.

LOYAL E. KEIR,
Assistant United States Attorney.

February, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: day of, 1967.

Attorney

APPENDIX

Bankruptcy Act, c. 541, 30 Stat. 544 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]:

Sec. 2. *Creation of Courts of Bankruptcy and Their Jurisdiction.*—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * * *

(11) Determine all claims of bankrupts to their exemptions;

* * * *

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

* * * *

(11 U.S.C. 1964 ed., Sec. 11.)

Sec. 6. *Exemptions of Bankrupts.*—This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at

the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess.

(11 U.S.C. 1964 ed., Sec. 24.)

Sec. 70. *Title to Property.*—[as amended by Sec. 23(a) and (b), Act of July 7, 1952, c. 579, 66 Stat. 420]. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * *

* * * *

(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy. * * *

* * * *

(11 U.S.C. 1964 ed., Sec. 110.)

CHAPTER XI—ARRANGEMENTS

Article I—Construction

* * * *

Sec. 302. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under sec-

tion 321 or 322 of this Act except where an adjudication had previously been entered.

* * * *

(11 U.S.C. 1964 ed., Sec. 702.)

Sec. 311. Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

* * * *

(11 U.S.C. 1964 ed., Sec. 711.)

Sec. 314. The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor.

* * * *

(11 U.S.C. 1962 ed., Sec. 714.)

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addi-

tion thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1964 ed., Sec. 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States, the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and Sale of Property.*—The term “levy” as used in this title includes the power of

distrain and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) *Successive Seizures*.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

* * * *

(26 U.S.C. 1964 ed., Sec. 6331.)

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration*.—There shall be exempt from levy—

* * * *

(c) *No Other Property Exempt*.—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U.S.C. 1964 ed., Sec. 6334.)

SEC. 6871. [as amended by Sec. 88(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. CLAIMS FOR INCOME, ESTATE, AND GIFT TAXES IN BANKRUPTCY AND RECEIVERSHIP PROCEEDINGS.

(a) *Immediate Assessment*.—Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, the approval of a petition of, or against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213 (a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

* * * *

(26 U.S.C. 1964 ed., Sec. 6871.)

No. 20030

See Vol. 3366

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CITIZENS BAND ASSOCIATION,
INCORPORATED, a Corporation,
Petitioner.

VS.

THE UNITED STATES OF AMERICA and FED-
ERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR REHEARING

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APR 10 1967

FILED

1967

U.S. COURT OF APPEALS

No. 20030

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CITIZENS BAND ASSOCIATION,
INCORPORATED, a Corporation,
Petitioner.

VS.

THE UNITED STATES OF AMERICA and FED-
ERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR REHEARING

To The Honorable

Frederick G. Hamley, Circuit Judge

Walter Ely, Circuit Judge

J. Warren Madden, Judge of the Court of Claims

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a corporation, Petitioner, petitions for a re-

hearing to consider the decision entered in this action on March 7, 1967 on the following grounds:

1. Permits rule changes to be made without affording the statutory notice required.

2. Permits modification of existing radio licenses without a public evidentiary hearing being accorded to those licensees who requested the same.

3. Permits new rule changes not supported by a preponderance of disclosed evidence.

4. Permits respondent commission to use evidence in its rule making procedure which is not disclosed to the public or the courts.

5. Allows the court to be placed in such a position in respect to frequency limitations that it states it "called for consideration of highly technical factors. We are in no position to rule that the Commission acted arbitrarily and capriciously in making that selection." Court had no evidence before it, other than the Commission's statement.

6. Permits respondent Commission to enact rules which are in the nature of a Bill of Attainder.

7. Permits the enactment of rules which unduly censor and impair the First Amendment right of freedom of speech.

Dated: ^{APRIL}~~October~~ 5, 1967

Respectfully submitted,

SEA AND HANNA
Attorneys for Petitioner.

The undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well-founded.

DONALD M. SEA

*See Vols.
3353
3354*

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 20074

K-91, INC.,
Appellant,

v.

GERSHWIN PUBLISHING CORPORATION, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

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Seattle, Washington 98101

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 20074

K-91, INC.,
Appellant,

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GERSHWIN PUBLISHING CORPORATION, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

GROUNDS

Pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby petitions the court for a rehearing upon the following grounds:

ASCAP and the Antitrust Laws

1. The opinion by the court recites that appellant contended that appellees and ASCAP were misusing their copyrights in violation of public policy generally, apart from the federal or state antitrust laws. This was the precise grounds upon which *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (1948) and *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (1948) were decided against ASCAP. Yet the court failed to answer this contention, to analyze or distinguish it, or even cite one case to the contrary.

2. The court admitted that the prime issue of whether a consent decree can immunize against further prosecution for violation of the antitrust laws was a "very perplexing problem." Then it wholly failed to answer the issue stating that the antitrust laws were not violated because the consent decree disinfected the ASCAP combination. Such an analysis only begs the original question by circular reasoning.

3. The court ruled that there were no violations of the antitrust laws for two reasons, both of which are clearly erroneous: (1) the consent decree provides that the United States District Court for the Southern District of New York (Judge Ryan) may "fix a reasonable fee," and (2) the ASCAP affiliation contracts are nonexclusive.

In so ruling the court ignored, and failed to distinguish or even *cite*, the cases such as *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) all holding that price fixing is a *per se* violation and that the reasonableness or unreasonableness thereof is immaterial. Even Judge Ryan himself, who presides over the ASCAP consent decree, has ruled that collective licensing of copyrighted works is not absolved from antitrust violations by "... the good motives of the parties nor the reasonableness of the price set." *Affiliated Music Enterprises v. Sesac, Inc.*, 160 F. Supp. 865, 875 (1958).

The second reason given by this court that appellees and ASCAP do not violate the antitrust laws (that the licenses are exclusive) also ignores every case that has passed on this very question. The *Alden-Rochelle* case, *supra*, and *M. Witmark & Sons* case, *supra*, both ruled against ASCAP when it defended on the basis of the non-exclusivity of its licensing, not to mention the voluminous other cases cited in appellant's brief on appeal. Again this court failed to distinguish, acknowledge or even *cite* this long line of cases. And again Judge Ryan has ruled that affiliation agreements for pooling copyrighted works, even where per piece licenses are *available*, are an illegal "... sharing of revenue struck down as violative of Section 1 of the Sherman Act. . . ." *Affiliated Music Enterprises v. Sesac, Inc.*, *supra*, at p. 875.

4. Among the many other antitrust violations argued by appellant and appellees that were ignored by the court are the patently obvious pooling and tying agreements that are the cornerstone of ASCAP's very foundation. Again the court failed to distinguish or cite even *one* of the multitude of cases holding pooling agreement violations *per se*. Again, the court has ignored the teachings of the court presiding over ASCAP's consent decree, Judge Ryan, that "... pooling agreements are *per se* violations of the antitrust laws." *Affiliated Music Enterprises v. Sesac, Inc.*, *supra*, at p. 875. It seems inconceivable that the opinion failed to even consider or recognize such unequivocal teachings of the Supreme Court that "tying arrangements" of copyrighted materials *could* perhaps "rarely" not violate the antitrust laws. "However, we find it difficult to conceive of such a case. . . ." *United States v. Loew's Inc.*, 371 U.S. 38, 49 (1948). If this is such a "rare" case that the Supreme Court has difficulty even *conceiving* it, it would appear rather compelling that this court describe why this is such a case.

5. The opinion ignores many of the stipulated facts such as Stipulated Fact 50 of the Pretrial Order (R. 30, Fact 50), that the negotiation of individual licenses is virtually impossible. This one fact alone is totally inconsistent with the opinion's determination that the preservation of individual licensing rights by individuals purifies the otherwise illegal activities of appellees and ASCAP. And again the many cases cited by appellant are omitted from distinction or even recognition. Again no heed whatsoever is paid to the Judge presiding over ASCAP's consent decree, as when Judge Ryan held that making "per piece" licenses available as the alternative to blanket licenses is merely the "lesser of two evils" with "... no 'genuine economical choice' between the two types of licenses." *Affiliated Music Enterprises v. Sesac, Inc.*, *supra*, at p. 875. Or, as one trial court judge in the State of Washington just weeks ago held regarding ASCAP's consent decree's so-called disinfection of ASCAP's violations, "... this is so impractical it is no alternative at all." *Cascade Broadcasting Co. v. ASCAP*, Superior Court of the State of Washington, Yakima County, No. 45877.

ASCAP AND THE WASHINGTON STATE ANTITRUST LAWS

6. The opinion's finding that "appellant could have obtained a license from ASCAP, valid under Washington law so far as this record before us discloses" simply ignores the record and cites a letter dated in 1948 from the Washington Attorney General that ASCAP issues per piece licenses. *The record discloses without contradiction* that the only licenses available to radio stations in Washington *at the time of the infringement* were the two ASCAP forms of blanket licenses. What the situation was in 1948 is not in the record or even relevant. The per piece licenses filed with the Secretary of State were available only to non-broadcasters who were not even licensed. Defendants' Exhibits 7, 8, 8-A, Schedule 11. Hence, the opinion ignores the *record*, and erroneously refers to a 1948 hearsay letter that is inconsistent with a subsequent opinion from the Attorney General, dated June 8, 1962. Defendants' Ex. A-13, A-14. We can only conclude that the court mistakenly read the record.

7. For the same reason the opinion erred in finding that appellant failed to apply for a license. As just stated, blanket licenses were the only kind available. Per piece licenses were not available to broadcasters.

8. For the same reason the opinion is in error in placing significance on the finding of the trial judge that ASCAP has not received any request from a broadcaster for the issuance of a license to perform one or more specified compositions. They were not available, notwithstanding what the Attorney General may have opined nineteen years ago. The error is compounded in failing to recognize Agreed Fact 27 (R. 30, Fact 27), that appellants "did not ask for per piece licenses from individual plaintiffs, because to do so would have been a useless and futile act." The error is compounded further in overlooking that on many occasions broadcasters asked for per piece licenses from ASCAP and were always refused. Defendants' Exs. A-15 through A-22. (See Appellant's Brief, pp. 48-49).

CONCLUSION

In view of the fact that the trial court announced at the opening of the trial that the case had to be tried in one day, the court forced appellant to introduce all exhibits virtually in a pile at one time without an opportunity to logically present them, and generally made shambles out of the record, it is not difficult to understand why this court would have such difficulty with the record. Still, it should not be ignored. Nor should an admittedly "very perplexing problem." Nor should the authoritative cases. If they can be distinguished they should be. It is urgent to all users of music. Even now ASCAP continues to bring similar suits against broadcasters in the State of Washington. It has recently included the hotel industry. All need the court's complete scrutiny of the record. All need a decision that cites the legal precedents, analyzes them and provides some guidance. On rehearing and reconsideration reversal must logically follow.

Respectfully submitted.

RONALD A. MURPHY

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in my judgment this Petition for Rehearing is well founded and is not interposed for delay.

RONALD A. MURPHY

Attorney for Petitioner

No. 20099

Del. 10/11/14
3354

**United States Court of Appeals
For the Ninth Circuit**

JACQUES ARLEY and CHARLOTTE ARLEY, husband and
wife, *Appellants*,

vs.

UNITED PACIFIC INSURANCE COMPANY, a Washington
corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

APPELLANTS' PETITION FOR REHEARING

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THE ARGUS PRESS



SEATTLE, WASHINGTON

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10-24737

United States Court of Appeals
For the Ninth Circuit

JACQUES ARLEY and CHARLOTTE ARLEY, husband and
wife, *Appellants*,

vs.

UNITED PACIFIC INSURANCE COMPANY, a Washington
corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

APPELLANTS' PETITION FOR REHEARING

ARTHUR S. LANGLEIE
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419 Norton Building
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**United States Court of Appeals
For the Ninth Circuit**

JACQUES ARLEY and CHARLOTTE ARLEY, husband and wife,	<i>Appellants,</i>	} No. 20099
vs.		
UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

APPELLANTS' PETITION FOR REHEARING

To the Honorable Charles M. Merrill, M. Oliver Koelsch, Circuit Judges, and John C. Bowen, District Judge:

Appellants respectfully petition the Court for a rehearing because the Opinion of the Court in this case, appellants believe, is in conflict with the laws of the State of Oregon and is in conflict with decisions of the Supreme Court. Further, appellants believe that in formulating its opinion herein, the Court did not consider the relationship existing between Mr. Chaney and the Arleys commencing as early as 1958 and continuing beyond October 1962. Nor did the Court consider, appellants believe, the representations or statements made by Chaney or his apparent authority upon which the Arleys relied, as clearly appears from the record herein.

GROUNDS

1. The Opinion of the Court Misconstrues the Oregon Insurance Code and Implies Erroneously that Broker Status May Exist in the State of Oregon Under Its Insurance Laws.

Under the insurance laws of the State of Oregon there is no licensing of brokers and there is no legal status in the insurance industry in the State of Oregon denominated broker. Under Oregon law all persons dealing in the sale of insurance are either agents or solicitors, and the latter are subagents acting for another agent or agents.

It is of critical importance, which appellants believe the Court has overlooked, that Mr. Chaney could only have acted as a matter of law in the capacity of an agent and that capacity determined his capacity to bind the insurer in this case.

The Oregon law was designed by the Legislature of that State to protect the insurance-buying public of Oregon by appropriate regulation and related licensing in the interest of fair dealing, accountability, and to assure that insurance coverage would promptly attach upon the order by the customer to his agent. The relationship has fiduciary responsibilities and the Oregon law was and is intended to avoid a hiatus in insured protection. "The Regulation of Insurance Marketing" Spencer L. Kimball and Bartlett A. Jackson, 61 Columbia Law Review 141, 165, 166.

La Tourette v. McMaster, 39 C.St. 160, 248 U.S. 465. 63 L.Ed. 362.

2. The Relationship of Mr. Chaney to the Arleys, His Apparent Authority and His Representations of Coverage Bound the Insurer and or Estopped the Insurer from Asserting the Lack of Insurance Coverage.

Mr. Chaney first insured the Arleys property in January 1958 and at that time represented that he was an agent for Standard Accident Company (Tr. 60, 61). There were continuing dealings with the Arleys from that time to and beyond October 30, 1962. When Mrs. Arley requested coverage on the Nevada property for the second time Mr. Chaney at no time indicated he was unable to provide insurance, and in fact on inquiry by Mrs. Arley on several occasions Mr. Chaney indicated that insurance was in force, stating specifically that "you are covered" (Slip Opinion, p. 6, Tr. 90, 91, 93, 97, 100).

In summary, the Court has previously decided this matter on the erroneous assumption that the Oregon insurance law permitted the sale of insurance through a system of brokers. The State of Oregon has an agency system, not a brokerage system. *Osborn v. Ozlin*, 60 S.Ct. 758, 310 U.S. 53, 84 L.Ed. 1074.

CONCLUSION

In view of the Oregon law which requires that the sale of insurance be carried on only by licensed agents and solicitors, and which by definition makes them agents of the insurer, and in view of the relationship existing over a period of some years, Mr. Chaney's apparent authority, and his representations to the Arleys upon which they relied, petitioners respectfully submit that this matter should be reheard in order to obviate substantial error which would con-

fuse and alter the existing insurance law of the State of Oregon and do injustice to petitioners herein.

Respectfully submitted,

ARTHUR S. LAGLIE

Attorney for Appellant

419 Norton Building
Seattle, Washington 98104

Appendices

APPENDIX

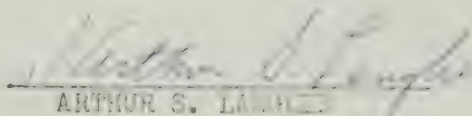
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By letter under date of June 30, 1967, the Insurance Commission of the State of Oregon by David J. De Martino, Assistant Attorney General, advised petitioners that under the Oregon insurance laws, "brokers are not licensed and there is no such thing as a broker."

It is to be hoped that the State of Oregon may determine to advise the Court of its view of the Oregon law by separate communication.

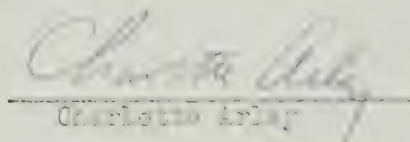
CERTIFICATE

The undersigned counsel for appellants hereby certifies that this petition for remission is presented in good faith and is not interposed for the purpose of delay.


ARTHUR S. LAMM

I hereby certify that service of this petition has been made on opposing counsel by sending four copies thereof on this 7th day of July, 1967, in an envelope, with postage paid, properly addressed to counsel as follows:

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In the United States Court of Appeals
for the Ninth Circuit

CURTIS GALLERY & LIBRARY, a family partnership,
H. T. CURTIS, SR., ARIETTE R. CURTIS, ELIZABETH
CURTIS and H. T. CURTIS, JR., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District
Court for the Southern (Now Central) District of California

BRIEF FOR THE APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,112

CURTIS GALLERY & LIBRARY, a family partnership,
H. T. CURTIS, SR., ARIETTE R. CURTIS, ELIZABETH
CURTIS and H. T. CURTIS, JR., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District
Court for the Southern (Now Central) District of California

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The District Court's memorandum of decision filed October 29, 1964 (I-R. 267-276), is reported at 241 F. Supp. 312. Its other memoranda of decision (I-R. 304-306, 343-344, 385-387, 392-393) are not officially reported.

JURISDICTION

This appeal involves federal income taxes and interest for the years 1944 through 1955 in the total

amount of \$12,556.97. (I-R. 150, 153-154.) The taxpayers allege that on August 8, 1963, they paid \$5,920.35 of taxes and interest. (I-R. 151-152.) The taxpayers filed a claim for refund on or about May 12, 1959. On May 25, 1962, more than six months after the claim was filed, no action having been taken by the Internal Revenue Service on the claim, the taxpayers brought an action in the District Court for the recovery of \$4,131.57 allegedly overpaid plus interest and \$150 of damages. (I-R. 2-55.) On August 23, 1963, the taxpayers filed an amended complaint in which they alleged that they were entitled to recover taxes allegedly overpaid during the years 1944 through 1955 plus interest on the overpayments in the total amount of \$12,266.13, plus \$140.84 of interest paid on deficiencies asserted by the Commissioner and \$150 damages. (I-R. 149-174.) The taxpayers allege that the District Court had jurisdiction pursuant to 28 U.S.C., Section 1346(a), (b), and (c). Upon motions for summary judgment by the United States (I-R. 219-242), and by the taxpayers (I-R. 262-263), the District Court entered summary judgment on November 13, 1964 (I-R. 277-279), and its final judgment on March 16, 1966 (I-R. 394). The taxpayers filed a notice of appeal on January 11, 1965, from the November 13, 1964, judgment of the District Court. (I-R. 282.) The taxpayers allege that this Court has jurisdiction pursuant to 28 U.S.C., Section 1291.¹

¹ The taxpayers' appeal appears to be taken from a non-appealable order and, hence, is premature and should be dismissed. Under Rule 73(a) of the Federal Rules of Civil

Procedure an appeal is taken from the entry of judgment of the District Court (i.e., within 60 days in an action where the United States is a party). Rule 54(a) defines a judgment as a decree or order from which an appeal lies, and Rule 54(b) states that where there are multiple claims or multiple parties, a judgment which adjudicates fewer than all the claims and fewer than the claims of all the parties does not constitute a final judgment unless the District Court directs that his judgment shall be final as to some of the parties or some of the issues. In turn, Rule 58, as amended in 1963, provides for the entry of a judgment upon a decision by the District Court that a party shall recover only a sum certain or costs or that all relief shall be denied.

In the present case the taxpayers filed a notice of appeal (I-R. 282) from the entry of summary judgment (I-R. 277-279) on November 13, 1964. However, by its terms the summary judgment did not decide all of the issues in this proceeding but held only that the taxpayers were not entitled to any relief for years prior to 1955. Moreover, the District Judge explicitly expressed an intention that his summary judgment was not a final judgment when he included language in the judgment setting a hearing on November 16, 1964, "for the purpose of determining amounts due, if any, to H. T. Curtis, Sr., Ariette R. Curtis and Elizabeth J. Curtis" for 1955, and he did not direct that the summary judgment should constitute his final judgment either as to H. T. Curtis, Jr., or as to all issues, i.e., the taxpayers' claims for the year 1955 and subsequent years. Additionally, for one and one-half years after the entry of summary judgment the parties continued to litigate the amount of recoveries due them; the District Court held several hearings and issued four additional memoranda of decision. (I-R. 304-306, 343-344, 385-387, 392-393.) The District Court did not enter a judgment which resolved all of the issues relating to all of the taxpayers until March 16, 1966, when it finally issued its "Final Judgment". (I-R. 394.)

Under these circumstances it is clear that the entry of the summary judgment neither was intended to nor did it dispose of the proceedings in the District Court. Hence, the notice of appeal filed by the taxpayers from the entry of the Na-

QUESTIONS PRESENTED

1. Are the taxpayers entitled to refunds of income taxes paid for the years 1944 through 1955 either under Section 1311 through 1314 of the Internal Revenue Code of 1954, or as a loss from theft under Section 165?

2. Are the taxpayers entitled to recover \$150 in damages against the United States for the cost of hiring an enrolled representative to file their protest with the Internal Revenue Service?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*.

STATEMENT

The relevant facts as found by the District Court (I-R. 267-269) may be summarized as follows:

The taxpayers operated the Curtis Gallery & Library as a partnership from 1944 until its dissolution on December 31, 1956. From 1944 through 1955 the bookkeeper for the partnership, a Mr. Cusac, kept the partnership books and prepared the annual partnership tax returns. In January, 1956, Mr. Cusac, then over eighty years of age, retired. He has since passed away. Mr. Switzer took over his accounting. He ob-

vember, 1964, judgment was prematurely filed under Rule 73; it is a nullity and should be dismissed. See 7 Moore's Federal Practice (1966 ed.), Section 73.09; 3 A Barron and Holtzoff, Federal Practice and Procedure (1958 ed.), Section 1553, p. 73.

tained extensions of time for filing the 1956 partnership return and the 1956 returns for the individual partners. On December 17, 1957, he suffered an incapacitating stroke without having filed the returns. (I-R. 267-268.)

Miss Lillian Castellano took over the books in January, 1958. The 1956 partnership return was finally filed on February 20, 1959. This return reflected a net loss of \$42,718.22, which included \$31,167.52 denominated as a "loss disclosed by audit". (I-R. 268.)

The Internal Revenue Service disallowed in its entirety the claimed deduction of \$31,167.52. However, it allowed a net operating loss of \$11,550.70 for 1956 which it allocated equally among the partners. The partners generally offset their allocable shares of the allowed net operating loss against other income for 1956 and carried the balance of the net operating loss to other years, giving rise to refunds for 1954 and 1956. The Service set off these refunds against deficiencies assessed by it against the taxpayers for the years 1958 and 1959. The excess amount of the deficiencies was paid by the taxpayers on August 8, 1963. The taxpayers exhausted their carry-overs in 1957. (I-R. 268.)

This proceeding was decided on motions for summary judgment filed by the Government (I-R. 219-242) and by the taxpayers (I-R. 262-263). Based upon statements alleged in support of the motions, the District Court found that the original partnership bookkeeper, in computing partnership net or taxable income for each of the years 1944 through 1955, had improperly treated funds withdrawn by Hunley Cur-

tis, Sr., from the partnership during those years. The District Court concluded that this resulted in an overstatement of the partnership income and, hence, each partner's distributive share for each of these years. (I-R. 268-269.)

The taxpayers filed an Application for Tentative Carryback Adjustment (Form 1045) on February 20, 1959, in which they requested refunds for each of the years 1953, 1954 and 1955. (I-R. 269.)

In its memorandum of decision on the motions for summary judgment the District Court held that the years 1944 through 1954 were closed by the statute of limitation, that the taxpayers failed to file timely claims for those years, and that the taxpayers were not entitled to any recovery for those years either as a theft loss or pursuant to Sections 1311 through 1314 of the 1954 Code. The District Court also held that the taxpayers were not entitled to any recovery for \$150 in alleged damages. Finally, the District Court found that since H. T. Curtis, Jr., had no distributive share of partnership income in 1955, he was not entitled to any refund for that year. (I-R. 269-276.) Thereupon the District Court entered summary judgment on November 13, 1964, dismissing the taxpayers' claims for all years prior to 1955 and ordering a hearing to be held to determine what amounts, if any, were owing to the taxpayers for 1955. (I-R. 277-279.)

Subsequently, the District Court entered four additional memoranda of decision in this proceeding, as follows: On February 1, 1965, the Government contended that the taxpayers, H. T. Curtis, Sr., and Eliz-

abeth Curtis, had failed to file a timely claim for refund for 1955. (I-R. 286-288, 302-303.) In its memorandum of decision entered on March 1, 1965, the District Court denied the Government's motion and ordered a hearing to determine what amounts were due these taxpayers. (I-R. 304-306.) Pursuant to the Government's motion to reconsider its decision of March 1, 1965 (I-R. 308-311, 313-322), the District Court entered a memorandum of decision on November 30, 1965, determining a refund for 1955 due Elizabeth Curtis in the amount of \$160.91, and due H. T. Curtis, Sr., in the amount of \$395 (I-R. 343-344). The Government objected to the amount of the court's proposed judgment. (I-R. 345-357, 359-372.) On February 23, 1966, the District Court entered a memorandum of decision recomputing the refund for 1955 due Elizabeth Curtis as \$80.46, and a refund for 1957 due H. T. Curtis, Sr., in the amount of \$463.42. (I-R. 385-387.) On the basis of the Government's computation of the corrected tax liability of H. T. Curtis, Sr. (I-R. 388-391), the District Court on March 16, 1966, amended its prior decision, holding that it had previously erroneously computed the net operating loss carry-over from 1955 to 1957 for H. T. Curtis, Sr., and that his refund for 1957 should be \$262.97. (I-R. 392-393.)

On March 16, 1966, the District Court entered its final judgment. (I-R. 394.) The taxpayers, however, previously had filed their notice of appeal on January 11, 1965, from the summary judgment entered by the District Court on November 13, 1964. (I-R. 282.) The United States filed a notice of appeal on May 13,

1966, from the final judgment of the District Court, from the allowance of any refund to Elizabeth Curtis for 1955.

SUMMARY OF ARGUMENT

I

Sections 1311 through 1313 of the 1954 Code provide that in certain specified circumstances the bar of the statute of limitations may be lifted to permit the Commissioner to assert a deficiency or a taxpayer to claim a refund for an otherwise closed year. This mitigation statute represents an attempt by Congress to provide a relief measure both for the Commissioner and for taxpayers, but it also represents an attempt to protect the essential validity of the statute of limitations by confining the relief to certain well-defined situations. The statute provides that under specified circumstances where an error has been made in the inclusion or exclusion of an item of income or in the allowance or disallowance of a deduction or in the tax treatment of a transaction affecting the basis of property, the error may be corrected even though the ordinary period of limitations has run.

Section 1311(a) provides that if a "determination" as defined in Section 1313 has been made with respect to an error as described in Section 1312, the effect of the error shall be corrected by an adjustment made in the amount and manner specified in Section 1314, if, on the date of the determination, correction of the error is otherwise prevented by some law or rule of law, such as the statute of limitations.

A. Pertinent to this case, a "determination" is defined in Section 1313(a)(3)(B) as a final disposition by the Commissioner of a claim for refund. In the present case the taxpayers commenced this suit for refund in less than two years from the time the Commissioner disallowed their claims. Accordingly, there never has been any final disposition in this case and, hence, no determination.

Nevertheless, the District Court held that there was a determination because the Commissioner disallowed only part of the taxpayers' claims for 1956 and allowed part, and that a claim for refund was finally disposed of as to those items for which the claim was allowed. However, this provision does not apply to the circumstances of this case. Here, the item which was allowed by the Commissioner had no relation to any of the errors which the taxpayers allege to have occurred in the earlier, barred years. Thus, at most, there would be a final disposition only of an item which is not the subject matter of this proceeding.

Moreover, in holding that there was a determination, the District Court overlooked the fact that not all final dispositions of a refund claim constitute a determination. Section 1311(a) states that the determination must be one which is described in Section 1312. The items in Section 1312 refer to a determination which requires the double inclusion of an item of income or the double disallowance of a deduction. In the present case the Commissioner's disallowance of the \$31,167.52 deduction item in 1956 did not relate to any double inclusion of the same item in gross incomes in 1956 and in the earlier, barred years and

it did not relate to any double disallowance of a deduction of the same item.

B. Also pertinent to this case, Section 1312 defines the various circumstances with respect to which an adjustment is authorized as a double inclusion of an item in gross income or the double disallowance of a deduction. In the present case the taxpayers overstated their distributive shares of partnership income for the years 1944 through 1955 and claimed a loss deduction in 1956 for the entire amount of their overstatements. Consequently, there was no double inclusion of the same item in gross incomes in the open year (1956) and in the earlier years (1944 through 1955). Likewise, the Commissioner has not disallowed the same deduction for 1956 which he erroneously had disallowed in the earlier years.

Without any explanation, the District Court held that there was a circumstance of adjustment in this case, i.e., a double disallowance of a deduction as set forth in Section 1312(4). However, the court below held that the taxpayers were not entitled to any recovery for any of the years 1944 through 1954, because Section 1311(b)(2)(B) requires that in the case of an adjustment relating to a double disallowance of a deduction, an adjustment may be made for a year only if a refund for that year was not barred when the taxpayer first maintained in writing that he was entitled to the deduction. We agree with the District Court that if the circumstance of adjustment as set forth in Section 1312(4) is present here, then at least all of the years 1944 through 1954 were closed before the taxpayers filed their claims for refund on

or about May 12, 1959. We also contend that the year 1955 similarly was closed since the claim for refund was filed after 1955 became barred to an adjustment. The District Court held, however, that the "in writing" requirement is not limited to a formal document, but includes an application for tentative carry-back adjustment, and that Elizabeth Curtis filed such an application on or about February 20, 1959, which would be timely for 1955. We have not found any authority to support this portion of the decision below. Moreover, it appears contrary to Section 1.1311 (b)-2(b) of the Treasury Regulations on Income Tax (1954 Code), which prescribes a formal assertion in writing, such as a statement in a return in a claim for refund, or in a petition before the Tax Court. It also appears contrary to Section 6411(a) of the 1954 Code, which states that an application for tentative carry-back adjustment does not constitute a claim for refund.

II

Initially, the taxpayers contended that the failure of their former bookkeeper for the partnership to account properly for withdrawals by H. T. Curtis, Sr., during 1944 through 1955 constituted a loss by theft which may be deducted in 1956, when the prior errors were discovered. However, there is nothing in the record to show that these overstatements of partnership income did not result from an honest mistake, and the taxpayers have not shown that their bookkeeper had overstated income with a fraudulent in-

tent to deprive them of their property or to appropriate partnership funds to his personal account.

III

The taxpayers also contend that they are entitled to \$150 in damages against the United States because they were denied an independent conference by the Internal Revenue Service, and they were forced to spend \$150 to hire an enrolled representative because the Service refused to allow their present bookkeeper (who was not enrolled to practice before the Service) to represent them in filing a protest.

An examination of the record shows that the taxpayers refused to attend the informal conference upon the mistaken impression that the conferee appointed for that meeting was not an independent conferee. The record also shows that the Service followed all of the procedures for such a conference as set forth in the published rulings, and the taxpayers have not shown that they sustained any resulting injury or loss.

Although the taxpayers' bookkeeper is an accountant, she was not enrolled to practice before the Treasury Department. The pertinent Regulations generally restrict practice before the Treasury Department to persons who are enrolled as qualified. This is a reasonable condition since the purpose of a protest proceeding is to discuss pending legal issues, and it generally is to the best interest of all parties to be represented by persons well-versed in tax law to determine whether the revenue agents had made errors of law.

There are, however, certain exceptions contained in these Regulations. For example, the taxpayers could have represented themselves, but they apparently did not desire to do so. They could have been represented by their bookkeeper if she was a full-time employee of the partnership, but this was not the fact. In any event, the taxpayers' bookkeeper was permitted to represent them prior to the filing of the protest, and she had the opportunity to furnish the revenue agents with all the pertinent information in her possession.

ARGUMENT

I. The Taxpayers Are Not Entitled to Any Refunds of Taxes for the Years 1944 Through 1955 Under Sections 1311 Through 1314 of the Internal Revenue Code of 1954

A. *Introduction to Sections 1311 through 1315*

Ordinarily, when the statute of limitations has run on the right of the Commissioner to assert a tax deficiency or on the right of a taxpayer to claim a refund for overpayment, correction of errors for the barred year is not permitted. However, Sections 1311 through 1314 of the 1954 Code (Appendix, *infra*) provide that under specified circumstances where an error has been made in the inclusion or exclusion of an item of gross income or in the allowance or disallowance of a deduction or in the tax treatment of a transaction affecting the basis of property, the error may be corrected even though the ordinary period of limitations has run.

In the present case there is no dispute but that the time for filing refund claims specified in Section 6511

(a) of the 1954 Code (Appendix, *infra*) had expired for the years 1944 through 1955 before the taxpayers filed their claims on or about May 12, 1959, for the years 1953, 1954 and 1955. Hence, the taxpayers are not entitled to any recovery in this proceeding if the mitigation provisions are not applicable to them.

Sections 1311 through 1314 are not designed to afford a general mitigation of the effect of the statute of limitations or to permit a general reopening of closed years. Instead, they are limited to certain well-defined and limited circumstances. Moreover, the party seeking the benefit of the statute is required to establish clearly the applicability of each of the specific requirements. *United States v. Rigdon*, 323 F. 2d 446, 449 (C.A. 9th); *Commissioner v. Goldstein's Estate*, 340 F. 2d 24, 27 (C.A. 2d); *Olin Mathieson Chemical Corp. v. United States*, 265 F. 2d 293, 296 (C.A. 7th); *Knowles Electronics, Inc. v. United States*, 365 F. 2d 43, 47-48, 49 (C.A. 7th); *Taxeraas v. United States*, 269 F. 2d 283, 289 (C.A. 8th); *Sherover v. United States*, 137 F. Supp. 778, 780 (S.D. N.Y.), affirmed *per curiam*, 229 F. 2d 766 (C.A. 2d). See 2 Mertens, Law of Federal Income Taxation (Rev.), Section 14.01.

Pertinent to the present case, Section 1311(a) provides that if a "determination", as defined in Section 1313, has been made for an open year with respect to an error described in Section 1312 for a barred year, the effect of the error for the closed year shall be corrected by an "adjustment" made in the amount and manner specified in Section 1314 if on the date of the determination correction of the error is other-

wise prevented by some law or rule of law, such as the statute of limitations. Section 1311(b)(2)(B) specifies as a necessary condition to the allowance of an adjustment involving the double disallowance of a deduction as described in Section 1312(4) that the year of adjustment must have been open for a credit or refund claim at the time the taxpayer claimed in writing that he was entitled to the deduction for the taxable year to which the determination relates. Section 1311(b)(1)(A) specifies that if a determination has been made with respect to other errors described in Section 1312, the Commissioner must have adopted in his determination for the open year a position which is inconsistent with the erroneous treatment of the item in the earlier year.

Also pertinent to this case, a "determination" is defined in Section 1313(a) in subparagraph (1) as "a decision by the Tax Court or a judgment, decree or other order by any court of competent jurisdiction, which has become final;" and in subparagraph (3) as "a final disposition by the Secretary or his delegate of a claim for refund". For this purpose a claim for refund is finally disposed of for items disallowed in whole or in part, "on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time)".

The relevant facts in this case are not disputed. The taxpayers contend that they overstated their partnership net or taxable income for each of the years 1944 through 1955. They sought to compensate for these overstatements by claiming a loss deduction in their 1956 partnership return for the entire \$31.-

167.52 of overstatements. The taxpayers filed claims for refund for the years 1953, 1954 and 1955 on or about May 12, 1959, in which they sought to carry back the alleged loss from 1956 to these earlier years. The taxpayers also filed an amended return for 1957 in which they sought to carry over part of the loss from the earlier years, and they filed amended returns and requests for refunds for 1958 and 1959 in which they sought to deduct the balance of the loss carry-over. The Commissioner disallowed their claims for refund for 1953, 1954 and 1955, as well as their applications for tentative carry-backs of losses to those years, on the ground that they were barred by the statute of limitations. The Commissioner also assessed deficiencies in income tax against the taxpayers for the years 1957, 1958 and 1959 resulting from the disallowance of the loss carry-forward. (I-R. 186, 213-215.)

In the proceeding for summary judgment in the court below the Government contended that the provisions mitigating the effect of the statute of limitations did not apply to the facts of this case, and that there were no circumstances of adjustment as defined in Section 1312 and no determination as defined in Section 1313. The District Court held that the denial of the taxpayers' claims for carry-back of the 1956 alleged loss was a "determination" within the meaning of Section 1313, and that there was a double disallowance of a deduction and, hence, a "circumstance of adjustment" within the meaning of Section 1312 (4). However, the District Court held that when the

taxpayers first claimed a deduction for 1956 the only year remaining open to adjustment under Section 1311(b)(2)(B) was 1955. On appeal the taxpayers contend that the District Court erred in disallowing any refunds attributable to years 1944 through 1954. The Government contends that the District Court correctly dismissed the taxpayers' claims for years prior to 1955, but that it erred in applying the mitigation provisions to 1955 and allowing a refund to Elizabeth Curtis for that year.²

B. *There has been no circumstance of adjustment as provided in Section 1312*

1. The taxpayers have not set forth clearly which of the circumstances of adjustment specified in Section 1312 applies to their situation, although they indicated below that the circumstances of adjustment set forth in Section 1312(1) is applicable here. That provision is as follows:

(1) *Double inclusion of an item of gross income.*—The determination requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

² The District Court also held that H. T. Curtis, Jr., was not entitled to a refund for 1955 since he had not received any income from the partnership for that year. (I-R. 270.) It does not appear that the taxpayers are questioning this determination on appeal. Moreover, the Government is not raising any issue on appeal concerning the carry-over of a loss by H. T. Curtis, Sr., to 1957.

The District Court correctly held (I-R. 274), that this provision by its own terms, does not apply. There was no double inclusion of an item in gross income both in the earlier years and in the later, open years. Instead, the facts show that the taxpayers erroneously included amounts in their gross incomes for the closed years which they sought to deduct in the open years. Thus neither the Commissioner's denial of a loss deduction for 1956 nor his denial of loss carryovers from 1955 to 1957, 1958 and 1959 required the taxpayers to include in their gross incomes for these open years the same item which had been erroneously included in their gross incomes for the years 1944 through 1955. Moreover, the provision in Section 1312(1) applicable to related taxpayers does not apply to the facts of the present case. Section 1312 (1) applies if the determination requires the inclusion of an item in the gross income of one taxpayer which had been erroneously included in the gross income of a related taxpayer for the same or another year. The taxpayers contend that they overstated their gross incomes for the years 1944 through 1955 by the amounts received by H. T. Curtis, Sr., during those years. However, as the District Court held (I-R. 274), the taxpayers have not shown that H. T. Curtis, Sr., erroneously included the withdrawals in his gross income for the years 1944 through 1955. Further, as shown, *supra*, there were never was any determination which required the other taxpayers to include the same item in their gross incomes which H. T. Curtis, Sr., had included in his income. Thus,

the circumstance of a double inclusion of an item in gross income does not apply in this case.^a

2. Instead, the District Court held (I-R. 273-274) that there was a circumstance of adjustment in the present case under Section 1312(4) relating to a double disallowance of a deduction. This provision is as follows:

(4) *Double disallowance of a deduction or Credit.*—The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

^a *United States v. Rachal*, 312 F. 2d 376 (C.A. 5th) is not relevant here. In that case the Commissioner had adjusted the value of the unit price of the taxpayer's inventory. The Fifth Circuit held that there was a double inclusion of an item in income for more than one year since a change in closing inventory for one year would affect opening inventory of the following year. Thus, the Fifth Circuit held that the change in valuation of the taxpayer's 1948 and 1949 inventory shifted income from those years to other years.

In *Rigdon v. United States*, 209 F. Supp. 267 (S.D. Calif.), reversed on other grounds, 323 F. 2d 446 (C.A. 9th), the District Court held that there was a double inclusion of an item of income where the Commissioner disallowed a deduction of rent paid by the parents to the guardian of their minor child, and the guardian had included the item of rent in the trust's income. This Court reversed on the ground that the parents and the guardian were not related taxpayers and did not discuss the question as to whether there had been a double inclusion of an item of income. In any event, we submit that the District Court erred in holding that this circumstance of adjustment should be construed very liberally to apply to the disallowance of any deduction which affects a taxpayer's gross income, and we have not found any support for the court's position.

We submit that the District Court erred in so holding.

If the taxpayers are contending that there was a disallowance of a deduction when the Commissioner disallowed the loss deduction for 1956 and a double disallowance when the Commissioner disallowed the loss carry-backs to 1953 through 1955, this would not meet the requirements of the statute. The disallowance of any loss carry-backs from 1956 resulted directly from the disallowance of the 1956 loss, and the Commissioner was not disallowing any deduction which should have been allowed to the taxpayers in other years.⁴

Moreover, there is no double disallowance of a deduction with respect to the years 1944 through 1955. Even if it is assumed that the amount claimed as a loss in 1956 should have been deducted from the taxpayers' distributive shares of partnership income during these earlier years, there has been no disallowance of a deduction in those earlier years which should have been allowed to the taxpayers. At most, there was a disallowed deduction in 1956 and wrongful inclusions in gross incomes in the years 1944 through 1955, a situation not covered by Section 1312(4).

Although most of the taxable years involved are governed by the Internal Revenue Code of 1939, the

⁴ The taxpayers cannot claim that there was a double disallowance of a deduction with respect to the years 1957, 1958 and 1959, since these latter years were not barred by the statute of limitations when the taxpayers filed their claims for refund, and Section 1312(4) does not apply to adjust open years.

applicable provisions of the 1939 and 1954 Codes are similar. The 1939 and 1954 Codes impose an annual income tax upon the net or taxable income of individuals. Net or taxable income is determined by subtracting allowable deductions from gross income. Allowable deductions may be taken only for the proper taxable year under the taxpayer's method of accounting. A taxpayer who keeps his books and reports his income upon the calendar year basis and on the cash receipts and disbursements method of accounting may deduct items of expense, including a reasonable allowance for salaries or other compensation for personal services actually rendered, only in the taxable year in which the payments are made. Likewise, the partnership, which kept its books and reported its income upon the calendar year basis and on the cash method of accounting, should have deducted the payments to H. T. Curtis, Sr., in each of the years in which payments were made to him.

The failure of the partnership to deduct the payments to H. T. Curtis, Sr., in each of the years 1944 through 1955 resulted in overstatements of the partnership net or taxable incomes for those years. However, a partnership is not subject to an annual income tax. Instead, each partner is required to include in his income his distributive share of the partnership net or taxable income. The net or taxable income of the partnership, with some exceptions not relevant here, is computed in the same manner as that of an individual. The failure of the partnership to deduct the payments to H. T. Curtis, Sr., in each of the

years 1944 through 1955 therefore caused each of the taxpayers to overstate his distributive portion of the partnership income. However, the failure of the taxpayers to reduce the partnership income by the amount of the payment to H. T. Curtis, Sr., and the failure of each taxpayer to make a corresponding reduction in his distributive share of partnership income, does not constitute a "deduction" within the meaning of the mitigation statute. *Knowles Electronics, Inc. v. United States*, 365 F. 2d 43 (C.A. 7th); *Brennen v. Commissioner*, 20 T.C. 495.⁵

3. Although the District Court held that there was a circumstance of adjustment under Section 1312(4), it concluded (I-R. 273) that it applied only to the year 1955. The application of a circumstance of adjustment in Section 1312 is limited by certain conditions which are set forth in Section 1311(b). Insofar

⁵ In *Brennen* there had been a determination allowing a deduction in one year and a claimed erroneous exclusion from gross income in another year. The Commissioner attempted to apply the mitigation provisions, claiming that there had been a double allowance of a deduction. The Tax Court disagreed, stating (20 T.C., p. 500) :

The taxpayer only claimed the deduction in a single year, 1944, and that was the year in which our determination allowed it. True, the amount of the deduction was a factor in adjusting the basis of the bonds for the purpose of determining the taxable gain on their sale in 1945, but that is a different matter from claiming "a deduction" in 1945.

Section 1312(5) refers to correlative inclusions in gross income and deductions from gross income as a circumstance of adjustment. However, this provision applies only to distributions by a trust or estate and is not applicable here.

as the circumstance of adjustment set forth in Section 1312(4) is concerned, Section 1311(b)(2)(B) contains the following conditions:

(b) *Conditions Necessary for Adjustment.*—

* * *

(2) *Correction not barred at time of erroneous action.*—

* * *

(B) *Determination Described in Section 1312(4).*—In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or his delegate or before the Tax Court of the United States, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates.

This limitation was included in Section 1311(b) to prevent an indefinite postponement of the statute of limitations against deductions. For example, in the absence of this provision, if a taxpayer failed to take a deduction in the proper year and then claimed the deduction in a later, erroneous year when the earlier year had become barred by the statute of limitations.

the taxpayer by his own act could forever reopen the earlier year.

This problem was resolved by Section 1311(b)(2)(B), which permits an adjustment for the earlier year only if a credit or refund attributable to the deduction in that earlier year was not barred at the time the taxpayer first maintained in writing that he was entitled to the deduction in the later year. See Treasury Regulations on Income Tax (1954 Code), Section 1.1311(b)-2(b); 2 Mertens, Law of Federal Income Taxation (Rev.), Section 14.08a.

In the present case the District Court held (I-R. 273) that the taxpayers first maintained in writing on February 20, 1959, when they filed Applications for Tentative Carryback Adjustments for the years 1953, 1954 and 1955, that they were entitled to a deduction. However, all of the years 1944 through 1954 were already barred by the statute of limitations, so that the taxpayers were not entitled to any relief for those years under Section 1312(4). As the District Court held (I-R. 273)—

If this were not so, the present statute of limitations would be entirely ineffective as a bar to *any* kind of mistake or oversight involving a deduction or credit on the part of a taxpayer where the taxpayer files a claim for refund. Int. Rev. Code 1954, §§ 1311-1315, were clearly not intended to achieve such an abrogation of the statute.

4. If Section 1312(4) applies to the circumstances of this case, which we deny, we agree with the holding of the District Court that it would not permit any

adjustment for the years 1944 through 1954. However, we disagree with the determination by the District Court (I-R. 304-306) that Elizabeth Curtis is entitled to adjust her income for 1955.

Elizabeth Curtis filed her claim for refund on or about May 12, 1959, which was more than three years after the filing of her return for 1955. The District Court held that her claim was timely filed for that year. Initially the court refers to Section 6511(d)(2)(A) (Appendix, *infra*), which provides a 39½-month period for filing a claim for refund attributable to a net operating loss carry-back in lieu of the normal three-year period applicable to other claims. However, the court appears to agree (I-R. 305) with the Government that her claim for refund for 1955 did not relate to an overpayment attributable to a net operating loss carry-back from 1956. Instead, any overpayment for 1955 resulted from a reduction in the 1955 taxable partnership income in the amount of \$3,350.74, attributable to a withdrawal by H. T. Curtis, Sr., for that year, and from a reduction in her distributive share of partnership income from 100 percent to 50 percent. (I-R. 350, 354-355, 363-365, 371.) Accordingly, Section 6511(d)(2)(A) would not be applicable.

The District Court held (I-R. 305-306) that the "in writing" requirement of Section 1311(b)(2)(B) is not confined to a formal written claim for refund but is satisfied by other written claims, including the Application for Tentative Carryback Adjustment

filed by Elizabeth on or about February 20, 1959.⁶ There does not appear to be any authority to support the District Court on this point. The Committee Reports do not discuss this requirement, and the authorities relied upon by the District Court do not appear to support his decision below. For example, Section 1.1311(b)-2(b) of the Treasury Regulations on Income Tax (1954 Code), cited by the court below (I-R. 306), in relevant part, is as follows:

§ 1.1311(b)-2 *Correction not barred at time of erroneous action.*

* * * *

(b) * * * The taxpayer will be considered to have first maintained in writing before the Commissioner or the Tax Court that he was entitled to such deduction or credit when he first *formally* asserts his right to such deduction or credit as, for example, in a return, in a claim for refund, or in a petition (or an amended petition) before the Tax Court. [Emphasis added.]

Moreover, Section 6411(a) of the 1954 Code (26 U.S.C. 1964 ed., Sec. 6411) provides that an application for a tentative carry-back adjustment shall not constitute a claim for refund.⁷

⁶ The claim for refund filed by Elizabeth Curtis on or about May 12, 1959, was not timely filed for 1955 under Section 1311(b) (2) (B).

⁷ The taxpayers contended below that H. T. Curtis, Sr., is entitled to a greater net operating loss carry-over to 1957 than allowed by the District Court. The taxpayers calculated the net operating loss carry-over by reducing H. T. Curtis, Sr.'s, gross income for 1957 by his deductions and exemptions

C. *There was no "determination" within the meaning of Section 1313*

In relevant part Section 1313(a) of the 1954 Code defines the term "determination" to include the following:

(a) *Determination*.—For purposes of this part, the term "determination" means—

* * * *

(3) a *final* disposition by the Secretary or his delegate of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary or his delegate—

* * * *

(B) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Secretary or his delegate in reduction of the refund or credit, on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time);

* * * [Emphasis added.]

Section 1313(a)(3)(B) of the 1954 Code and Section 1.1313(a)-3(c) of the Treasury Regulations on

and then applying the net operating loss carry-over to this net amount. The District Court correctly held (I-R. 392-394), however, that whenever a net operating loss carry-over is involved the taxpayer's gross income for that year must be modified in accordance with Section 172 of the 1954 Code (Appendix, *infra*). Section 172(d) provides that no modifications may be made to a taxpayer's gross income for personal exemptions.

Income Tax (1954 Code) provide that a claim for refund which is disallowed becomes final and, hence, a "determination" only after expiration of the time for bringing a suit for refund, which, under Section 6532(a)(1) of the 1954 Code (26 U.S.C. 1964 ed., Sec. 6532), is two years from the date of mailing the notice of disallowance. In the present case there never was any final determination of the taxpayers' claim when they instituted the present suit prior to the expiration of the two-year period. This conclusion is similar to decisions holding that there has been no determination where a judgment of a court had not yet become final. See *Gill v. Commissioner*, 306 F. 2d 902 (C.A. 5th).

Even if there were a final disposition of the taxpayers' claims, which we deny, there is an additional reason why the Commissioner's denial of the taxpayers' claim for refund does not constitute a determination within the meaning of Section 1313 (a). There is a close relation between the mitigation provisions. For example, Section 1312 defines the act which constitutes a determination, here the final disposition of a claim for refund. However, Section 1311(a) provides that the determination must be one which is described in Section 1312. All the items in Section 1312 refer to a determination which requires a circumstance of adjustment. For example, Section 1312(1) provides that the determination must require the double inclusion of an item of gross income, and Section 1312(4) provides that the determination must relate to a double dis-

allowance of a deduction. Thus, the mitigation provisions apply only to items involved in the determination which was the subject of the error. *Gill v. Commissioner*, 306 F. 2d 902, 906 (C.A. 5th); *First Nat. Bank of Phila. v. Commissioner*, 205 F. 2d 82, 85-86 (C.A. 3d); *Central Hanover Bank & Trust Co. v. United States*, 163 F. 2d 60 (C.A. 2d).

The Commissioner's disallowance of the taxpayers' claims for 1956 did not require any adjustment for other years. The ground upon which the claims were dismissed was that they were untimely filed, and this dismissal had nothing to do with the double inclusion of income for the years 1944 through 1955 or with the double disallowance of a deduction for one of the other years.

Nevertheless, the District Court held (I-R. 272) that there was a determination in this case because the service "disallowed only a portion of the claim while allowing a portion". This holding, however, fails to consider that the loss item allowed for 1956 and carried back to 1955 bore no relation to the loss item which was disallowed. The \$11,550.70 net operating loss allowed for 1956 arose out of normal partnership operations for that year and was not even remotely connected with any overstatements of partnership income resulting from \$31,167.52 of withdrawals by H. T. Curtis, Sr., during the years 1944 through 1955. The \$11,550.70 loss was not related to any double inclusion of a same item in the partnership gross income for another year or to the double disallowance of a same item of deduction for

another year. Consequently, the allowance of the \$11,550.70 loss as a deduction in 1956 was not the subject of the error by the taxpayers for which they are seeking the benefits of the mitigation provisions. *First Nat. Bank of Phila. v. Commissioner, supra.*

Thus, the District Court's reliance upon *United States v. Rachal*, 312 F. 2d 376, 379 (C.A. 5th), is misplaced. In *Rachal* the taxpayer filed claims for refund for 1948 and 1949 in which he contended that the Internal Revenue Service had overstated the unit cost and, hence, the valuation of his cattle inventories. As a result of these claims the Service re-examined the taxpayer's cattle inventories for the years 1948 through 1952, since any readjustment for the earlier years would affect the valuation of inventories in other years. The Service adjusted downward the value of the inventories and allowed part of the taxpayer's claims for 1948 and 1949. However it denied the balance of the claims for those years because payment was made within two years of filing the claims. The taxpayer then filed additional claims for this balance. The Fifth Circuit held that the entire claim for each year was based upon the inventory adjustments, and that allowance of part of each claim accepting the correctness of the readjusted inventories constituted a final disposition by the Commissioner of the claims. As we have pointed out, *supra*, the situation in the present case differs from that in *Rachal*, since there was no allowance of any part of the taxpayers' claims relating to the \$31,-167.52, and the allowance of a net operating loss of

\$11,550.70 for 1956 bears no relation to the error for which the taxpayers seek to apply the mitigation provisions.

II. The District Court Correctly Held That the Taxpayer Did Not Sustain Any Loss by Theft in 1956 Deductible Under Section 165 of the 1954 Code

The taxpayers initially contended (I-R. 2-55) that the statute of limitations is inapplicable to them on the ground that their bookkeeper erroneously had overstated partnership income during the years in which H. T. Curtis, Sr., had made capital withdrawals from the partnership and that such an erroneous treatment of income constituted a loss by theft deductible in the year in which it was discovered.

In computing taxable income a taxpayer is allowed a deduction for losses arising from theft. See Section 165(a) and (c)(3) of the 1954 Code (Appendix, *infra*). In contrast to losses arising from other causes, which are taxable in the year sustained, losses arising from theft are deductible in the year of their discovery. See Section 165(e) of the 1954 Code; 5 Mertens, Law of Federal Income Taxation (Rev.), Sections 28.48 and 28.59.

Whether a loss from theft has occurred depends upon the law of the jurisdiction in which the incident occurred. *Monteleone v. Commissioner*, 34 T.C. 688; *Morton v. Commissioner*, 40 T.C. 500; 5 Mertens, Law of Federal Income Taxation, *supra*, Section 28.59. In the present case there is no evidence that the overstatements of partnership income were not caused by an honest mistake. The taxpayers have not contended

that their bookkeeper had overstated partnership income with a fraudulent intent to appropriate partnership funds to his personal account, that he had appropriated to his own use any property or money belonging to the partnership or to an individual partner, or that he had intended to defraud the partnership or any partner of property or money belonging to them. Accordingly, the necessary elements of theft as defined in Section 484 of the Penal Code, 48 West's Annotated California Codes,⁸ are not present in this case.⁹

⁸ Penal Code, 48 West's Annotated California Codes:

Sec. 484. *Theft defined*

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. * * *

⁹ The taxpayers made several other contentions in the District Court, all of which the District Court correctly dismissed.

Elizabeth Curtis contended that she is entitled to an exemption for her mother in 1955. The District Court correctly dismissed this portion of her claim as follows (I-R. 385):

By defendant's memorandum of February 2, 1966, plaintiff Elizabeth J. Curtis was put on notice that she was to produce evidence supporting her claim that in 1955 she contributed sufficiently to her mother's support to

III. The District Court Correctly Held That the Taxpayers Were Not Entitled to Recovery of Damages Against the United States

The taxpayers seek \$150 in damages against the United States apparently upon two grounds: (1) They were denied an independent informal conference by the Internal Revenue Service, and (2) they were forced to spend \$150 to hire an enrolled representative because the Service refused to allow their present bookkeeper to represent them in filing a protest. The District Court correctly held against the taxpayers on both grounds.

In November, 1960 the taxpayers declined to accept adjustments proposed to their tax liabilities by Internal Revenue Agents and requested "a discussion at the conference board level". (I-R. 45-46, 47.) The Service then asked the taxpayers whether they desired an informal conference and, if so, with a "conferee who functions independently of the examining officer's group supervisor". (I-R. 48-51.) The taxpayers requested such a conference. (I-R. 52.) In January, 1961, the taxpayers were notified by John

claim her as a dependent. At the hearing of February 7, 1966, she produced no evidence. The taxpayer must support her claim. See *Burnet v. Houston*, 283 U.S. 223, 228 (1931).

The taxpayers also contended below that they overpaid interest on tax deficiencies for 1957, 1958, and 1959, on the ground that they failed to receive any credit for interest accruing to them on their claimed overpayments. The District Court correctly dismissed this contention on the ground (I-R. 275) that the court lacked jurisdiction of this matter under Section 7422(a) of the 1954 Code since the taxpayers had not filed any claims for refund for these years.

F. Hauner that he had been "assigned to act as an independent conferee", and he proposed a time for the conference. This letter was signed "John F. Hauner, Group-Supervisor-Conferee". (I-R. 53.) The taxpayers declined to attend the conference in which Mr. Hauner would be the independent conferee. (I-R. 53.)

The taxpayer's contention that they were denied an independent informal conference apparently is based upon their mistaken impression that Mr. Hauner was the Group Supervisor of the Internal Revenue Agents assigned to their case. Instead, as Mr. Hauner's affidavit points out (I-R. 240-241), all of the Internal Revenue Agents assigned to the Pasadena office of the Service were assigned to one of two field audit groups, and the Internal Revenue Agents involved in this matter were not assigned to Mr. Hauner but to the other group.

The primary purpose for an informal conference is to discuss questions of law and not of fact. In the present case the revenue agents had obtained the relevant facts from the taxpayers' bookkeeper. It is desirable that an independent conferee be knowledgeable of the legal issues, and the taxpayers have not questioned Mr. Hauner's ability. Further, there is nothing in the record which showed that he could not function as an independent conferee in this case, since his group was not charged with it. Rev. Proc. 56-34, 1956-2 Cum. Bull. 1396; Rev. Proc. 60-16, 1960-2 Cum. Bull. 940; Rev. Proc. 60-24, 1960-2 Cum. Bull. 998. In any event, the taxpayers have not shown that they sustained an injury or loss of property

from the appointment of Mr. Hauner, as required by 28 U.S.C., Section 1346(b).

With respect to the second contention raised by the taxpayers, the Service refused to allow Mrs. Castellano to represent the taxpayers in filing their protest. Although she was an accountant, she was not enrolled to practice before the Treasury, and the taxpayers paid an enrolled accountant \$150 to file the protest prepared by Mrs. Castellano. (I-R. 187, 215.)

Pursuant to his authority to prescribe rules and Regulations governing the representation of claimants before the Treasury Department, the Secretary of the Treasury has promulgated Regulations on Practice of Attorneys and Agents Before the Treasury Department (31 C.F.R., Part 10). Section 10.2 (a) of these Regulations provides generally "no person shall be recognized or permitted to practice before the Internal Revenue Service unless he is enrolled as an attorney or agent * * *." Sec. 10.2(b) defines the term "practice" to include the "preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings", but does not include "the preparation of tax returns * * * [or] nor the furnishing of information at the request of the Internal Revenue Service * * *."

However, certain individuals are entitled to practice without enrollment. Under Section 10.7(a) an individual may represent himself, and under Section 10.7(a)(1) an individual "may represent a partnership of which he is a member or a regular full-time

employee * * *.” Under Section 10.7(a)(7) (effective March 15, 1959), any person who signs an individual income tax return as having prepared it for the taxpayer may appear without enrollment “before revenue agents and examining officers of the Audit Division in the offices of District Directors (but not at the Informal Conference in a District Director’s office) with respect to the tax liability of the taxpayer for the taxable year or period covered by that return * * *.” If the taxpayer desires to file a protest, this must be “executed by the taxpayer and presented by the taxpayer or through his enrolled representative”. Rev. Proc. 59-3, 1959-1 Cum. Bull. 801, 803.

The taxpayers contend that Mrs. Castellano was qualified to file the protest because she was a full-time employee of the partnership. This contention is contrary to the undisputed facts, which show that the partnership was dissolved on December 31, 1956, and Mrs. Castellano was not asked to assume control over the partnership books and records until January, 1958. (I-R. 180, 181, 207, 209.)

Thus, the District Court correctly held (I-R. 274-275) that the taxpayers had failed to present to the Service a proper power of attorney for Mrs. Castellano, and the Government was not unreasonable in taking this position. Indeed, as noted *supra*, the purpose of informal conferences and protest proceedings is to accord taxpayers the opportunity to discuss the legal issues involved, and it is to the best interest of all parties to the conference that they be presented by persons well versed in tax law to determine whether the revenue agents had made errors of law. The

taxpayers have not shown that Mrs. Castellano qualifies for this purpose. In any event, she had been permitted to represent the taxpayers prior to the filing of their protest, so that she could have furnished the revenue agents with all the relevant information in her possession.

CONCLUSION

For these reasons, the judgment of the District Court should be affirmed in all respects, except for the allowance of a refund to Elizabeth Curtis for 1955, as to which the judgment should be reversed.

Respectfully submitted,

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APRIL, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 14th day of April, 1967.

/s/ Karl Schmeidler
Attorney.

APPENDIX

Internal Revenue Code of 1954:

SEC. 165. LOSSES.

(a) *General Rule*.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

(c) *Limitation on Losses of Individuals*.—In the case of an individual, the deduction under subsection (a) shall be limited to—

* * * *

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. * * *

* * * *

(e) *Theft Losses*.—For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

* * * *

(26 U.S.C. 1964 ed., Sec. 165.)

SEC. 172. NET OPERATING LOSS DEDUCTION.

* * * *

(c) *Net Operating Loss Defined*.—For purposes of this section, the term “net operating loss” means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

(d) *Modifications.*—The modifications referred to in this section are as follows:

* * * *

(3) *Deductions for personal exemptions.*
—No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

* * * *

(26 U.S.C. 1964 ed., Sec. 172.)

SEC. 1311. CORRECTION OF ERROR.

(a) *General Rule.*—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) *Conditions Necessary for Adjustment.*—

(1) *Maintenance of an inconsistent position.*—Except in cases described in paragraphs (3) (B) and (4) of section 1312, an adjustment shall be made under this part only if—

(A) in case the amount of the adjustment would be credited or refunded in the same manner as an overpayment under section 1314, there is adopted in

the determination a position maintained by the Secretary or his delegate, or

(B) in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under section 1314, there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made,

and the position maintained by the Secretary or his delegate in the case described in subparagraph (A) or maintained by the taxpayer in the case described in subparagraph (B) is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

(2) *Correction not barred at time of erroneous action.*—

* * * *

(B) *Determination Described in Section 1312 (4).*—In the case of a determination described in section 1312 (4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or his delegate or before the Tax Court

of the United States, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates.

* * * *

(26 U.S.C. 1964 ed., Sec. 1311.)

SEC. 1312. CIRCUMSTANCES OF ADJUSTMENT.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

(1) *Double Inclusion of an Item of Gross Income.*—The determination requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

* * * *

(4) *Double Disallowance of a Deduction or Credit.*—The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

* * * *

(26 U.S.C. 1964 ed., Sec. 1312.)

SEC. 1313. DEFINITIONS.

(a) *Determination.*—For purposes of this part, the term “determination” means—

* * * *

(3) a final disposition by the Secretary or his delegate of a claim for refund. For purposes of this part, a claim for refund

shall be deemed finally disposed of by the Secretary or his delegate—

* * * *

(b) *Taxpayer*.—Notwithstanding section 7701 (a) (14), the term “taxpayer” means any person subject to a tax under the applicable revenue law.

* * * *

(26 U.S.C. 1964 ed., Sec. 1313.)

SEC. 1314 AMOUNT AND METHOD OF ADJUSTMENT.

* * * *

(b) *Method of Adjustment*.—The adjustment authorized in section 1311(a) shall be made by assessing and collecting or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary or his delegate with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years. If, as a result of a determination described in section 1313(a) (4), an adjustment has been made by the assessment and collection of a deficiency or the refund or credit of an overpayment, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis

of such alteration or revocation and any overpayment or deficiency resulting from such redetermination shall be refunded or credited, or assessed and collected, as the case may be, as an adjustment under this part. In the case of an adjustment resulting from an increase or decrease in a net operating loss which is carried back to the year of adjustment, interest shall not be collected or paid for any period prior to the close of the taxable year in which the net operating loss arises.

* * * *

(26 U.S.C. 1964 ed., Sec. 1314.)

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) [as amended by Sec. 82(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] *Period for Filing Claim*.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

(b) *Limitation on Allowance of Credits and Refunds*.—

(1) *Filing of claim within prescribed period*.—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or re-

fund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * * *

(d) *Special Rules Applicable to Income Taxes.*—

* * * *

(2) *Special period of limitation with respect to net operating loss carrybacks.*—

(A) [as amended by Sec. 317(d), Trade Expansion Act of 1962, P.L. 87-794, 76 Stat. 872] *Period of Limitation.*—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends with the expiration of the 15th day of the 40th month (or the 39th month, in the case of a corporation) following the end of the taxable year of the net operating loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later; * * *

* * * *

(26 U.S.C. 1964 ed., Sec. 6511.)

UNITED STATES COURT of APPEALS
FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE County, Appellant,

vs.

CITY OF SEATTLE, Appellee.

CITY OF SEATTLE, Appellant,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND
OREILLE COUNTY, Appellee.

On Appeal from the Judgment of the
United States District Court for the Eastern District
of Washington

PETITION OF APPELLANT-APPELLEE
Public Utility District No. 1 of Pend Oreille County
FOR REHEARING AND FOR MODIFICATION
to

THE HONORABLE CIRCUIT JUDGES HAMLEY AND MERRILL
AND THE HONORABLE DISTRICT JUDGE BYRNE
the Court as constituted in the original hearing

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Spokane, Washington 99201

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Attorneys for Appellant-Appellee,
Public Utility District No. 1
of Pend Oreille County

SEP 27 1967

TO the Honorable Circuit Judges Hamley and Merrill and the Honorable District Judge Byrne, the Court as constituted in the original hearing:

On the appeal of PUD this Court proceeds on an erroneous understanding of the nature of value testimony that was stricken by the district court. In describing PUD's proof, this court said,

"Its witnesses valued the properties by capitalizing the earnings of a completed power plant at Z Canyon subtracting the cost of construction." (Emphasis added.)

This important factual conclusion is incorrect. In no sense did the PUD witnesses value the properties and rights by capitalization of earnings. A review of the testimony of PUD's witnesses set out in the appendix to its opening brief will show that no amount of anticipated earnings was estimated and no capitalization process was performed. The record shows that:

1. After describing the capitalization of income approach, the witness Vaughan said, "In view of this fact I did not think it to be proper to use any form of the income approach in evaluating these rights." (R. Tr. 1084.)

2. The district court said, with reference to the witness Courtney, "It isn't a comparable sale approach, *it isn't a capitalization approach, . . .*" (R. Tr. 1495) (Emphasis added.)

3. The testimony of PUD's witnesses was not objected to by Seattle on the grounds that it was based upon capitalization of earnings. (R. Tr. 1236-39, 1460-64).

The decision on PUD's appeal, having been based upon the erroneous belief that its witnesses valued the properties "by capitalizing the earnings of a completed power plant at Z Canyon, subtracting the cost of construction," calls for a reconsideration.

The opinion admits the concept of power site value described as "the highly enhanced value that may attach to the fully assembled land package (and its several parts) due to the fact that the prospective power project is dependent upon use of that package," but concludes that this type of value cannot be proven by capitalization of anticipated earnings because such proof "necessarily assumed the acquisition of an FPC license." Conceding the logic of this conclusion, it nevertheless is not dispositive of this case where the PUD witnesses did not arrive at value by use of the capitalization of earnings approach.

This court recognized that the district court had found the PUD could be credited with having such a "fully assembled land package." There have been no sales of a comparable package, and PUD witnesses used the only method available to prove value. Unlike the capitalization of income approach, their approach did not "necessarily" assume the acquisition of an FPC license. Because the PUD properties are on a navigable stream, the acquisition of an FPC license cannot be ignored. Its absence was recognized and the likelihood of its acquisition was weighed in arriving at value. (R. Tr. 1344, 1384.)

It is assumed the conclusion in the opinion that, "where condemnor and condemnee have competed for

a federal license, the prospects of the unsuccessful competitor, as a matter of foresight, must be deemed too speculative to permit him to attach value to the pre-existing likelihood of his succeeding in his efforts," applies only if it is sought to prove value by capitalization of earnings and was reached because of the mistaken belief that PUD had relied on that kind of testimony. If such conclusion was said to apply to the testimony of PUD's witnesses or other similar approaches not based upon capitalization of earnings, it would make a myth of the concept of true power-site value described above as there would be no way to prove it.

In condemnation actions brought under the Federal Power Act there will always be a successful applicant for the license who, in effect, will be the purchaser of the site by condemnation. The value of the site can be neither more nor less because the owner did or did not compete for a license. Many factors enter into the granting or denial of a license application that have nothing to do with the land package to be used in a project. For instance, the denial of a license to the owner of a land package because he fails to show an ability to finance a project does not destroy the value of the land package usable by a purchaser able to finance the project and to otherwise qualify for a license.

The statement in the opinion that,

"The successful licensee, in effect, must assume and make compensation for the very deficiencies which caused failure of the condemnee's application."

is not applicable in the absence of a showing that "the deficiencies which caused failure of the condemnee's application" were deficiencies in the land package itself. No such showing was made.

The decision on PUD's appeal having been premised on an erroneous assumption of fact, which error of necessity permeated the balance of the opinion, a rehearing en banc is warranted.

In any event, as was done by the Circuit Court of Appeals, Fourth Circuit, in *United States ex rel. TVA v. Powelson et al.*, 138 F. 2d 343 (CCA 4th Cir., 1943) Cert. denied, 321 U.S. 773, 88 L. Ed. 1067, 64 Sup. Ct. 612 (1944), the opinion should be modified to provide for a remand of the cause to the district court with leave to the parties to produce additional testimony because the record is devoid of any evidence upon which an award of just compensation could be made.

The following factors warrant such a modification:

1. This court concluded its decision on Seattle's cross-appeal by saying, ". . . full market value, including power site value, is the proper measure of compensation." (Emphasis added.)

2. The findings of the district court that, "The highest and best use of the PUD properties sought to be condemned in this action is for hydroelectric purposes," and that, "The testimony of power site value as expressed by witnesses for the defendant having been stricken, the only evidence in the record as to value is that testified to by witnesses for the plaintiff,

which includes no power site value," were recognized and accepted by this court. (Emphasis added.)

3. Seattle, who opened and closed the testimony, elected not to submit further evidence of value after PUD in its case had established the highest and best use of its properties to be for hydroelectric purposes.

4. PUD, in its motion to reconsider the ruling striking its testimony of fair market value (R. 48-50), sought an order that would permit it to seek an interlocutory appeal to this court on this point.

5. PUD moved for a new trial based upon entry of judgment upon the testimony of plaintiff's value witnesses for the reason that such judgment did not afford it just compensation for the taking of its properties. (R. 100). This appeal, among other things, was based upon the denial of the motion for new trial. (Specifications of Error No. 7, p. 49, PUD's opening brief.)

6. Admittedly, under the record as it now stands, the properties of PUD will be taken without payment of just compensation contrary to the fifth amendment to the constitution.

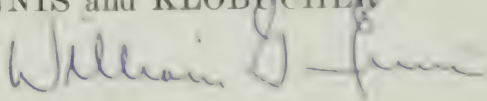
WHEREFORE, PUD RESPECTFULLY PRAYS that its petition for rehearing be granted. If a rehearing is not ordered, PUD prays that the decision be modified so as to direct a remand of the cause to the district court for further proceedings.

Respectfully submitted,

CLARENCE C. DILL

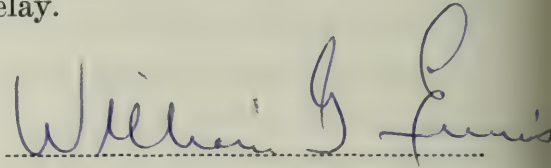
ENNIS and KLOBECHER

By



CERTIFICATE OF COUNSEL

I certify under Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit that in my judgment the foregoing Petition for Rehearing and for Modification is well founded and that it is not interposed for delay.

A handwritten signature in blue ink, reading "William G. Ennis", is written over a horizontal dotted line. The signature is fluid and cursive, with the last name "Ennis" being particularly prominent.

William G. Ennis

See Vol. 3389

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

UNITED STATES

U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Appellant

v.

TACOMA GRAVEL & SUPPLY CO., INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,218

UNITED STATES OF AMERICA,

Appellant,

v.

TACOMA GRAVEL & SUPPLY CO., INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

Appellant, the United States of America, respectfully petitions this Court for rehearing of the judgment entered in this case on January 25, 1967. The bases for this petition are set forth below:

1. The United States brought this suit to recover the unpaid balance of and accrued interest on a judgment previously entered in the Superior Court of the State of Washington. The district court rendered summary judgment for the defendants ^{1/}on

^{1/} Tacoma Gravel and Supply Co. had been dismissed on motion of the United States (R. 44).

the ground that the Government's suit was barred by a Washington statute, R.C.W. 4.56.210, which prohibits suit on any state judgment more than six years after entry of the judgment. On January 25, 1967, this Court affirmed the district court's decision, holding that the original judgment in favor of the United States, being more than six years old, "is dead" (Sl. Op. p. 3). Acknowledging that, under United States v. Summerlin, 310 U.S. 414, the United States could not be subjected to any state statute which "undertakes to invalidate [a] claim of the United States" (310 U.S. at 417), this Court expressly declined to decide whether R.C.W. 4.56.210 "also operates to cut off the claim underlying [the] judgment" (Sl. Op. p. 3).

a. In our view, a state statute cannot bar a claim of the United States, regardless of whether the claim be on a judgment or inchoate. Indeed, as we urged in our main brief (pp. 6-8), the reasons for protecting the sovereign from limitations on judgment claims are peculiarly strong. And, as we also indicated in our main brief (pp. 8-9), it long has been established that statutes like the one in issue here cannot apply to the United States. Because we thought it well settled that a limitation on suits on judgments could not bar a suit by the sovereign, we did not deem it necessary to discuss in our brief the question whether, if the United States were barred from suing on its judgment, it could still resort to suit on its underlying claim.

b. Contrary to our position, this Court concluded that Summerlin does not preclude the application against the United States of state statutes of limitations relating to judgments. The Court's reasoning was that the Summerlin doctrine only prevents the extinguishment of the underlying claim.

Having reached this conclusion (which we believe to be erroneous), it perforce became necessary for the Court to decide whether the extinguishment of the judgment automatically destroyed the underlying claim as well. This inquiry was required because, if the effect of applying the state limitation on judgments is to divest the United States of any cause of action against the appellee debtors,^{then,} as this Court recognized, Summerlin comes into play. Once again, Summerlin holds expressly that a state statute of limitations which purports to "invalidate the claim of the United States, so that it cannot be enforced at all" is a "transgres[sion of] the limits of state power." 310 U.S. at 417.

Insofar as we can determine, however, this Court did not address itself to this question. While reserving decision on the question as to whether if a suit were now brought on the underlying claim it could be deemed barred by limitations, there is no reference in the Court's opinion to the more basic issue: whether, limitations aside, the United States

any longer has a cause of action to assert.

The answer to this question is clear. As we show below, there is no room for doubt that the claim merged in the judgment and, therefore, no further suit on the claim is possible. Thus, R.C.W. 4.56.210 not merely operates to invalidate the judgment but, in addition, destroys the Government's claim.

2. The authorities are unanimous on the proposition that claims merge in judgments obtained thereon -- and are no longer enforceable except by the enforcement of the judgment. As stated in Freeman, Judgments (5th ed. 1925), §546 (footnotes omitted):

The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It "is drowned in the judgment," and must henceforth be regarded as *functus officio*.

And as enounced in the Restatement of Judgments (1942), §47:

Where a valid and final personal judgment in an action for the recovery of money is rendered in favor of the plaintiff,

- (a) the plaintiff cannot thereafter maintain an action against the defendant on the cause of action; but
- (b) the plaintiff can maintain an action upon the judgment.

Accord: Black, Judgments (2d ed. 1902) §674. In this Court's words (Filice v. United States, 271 F. 2d 782, 783 (per curiam),

certiorari denied, 362 U.S. 924);

the common law doctrine is that the original cause of action becomes merged in the judgment, and all the plaintiff can thereafter do is to sue on the judgment. 2/

In sum, R.C.W. 4.56.210 cannot be applied here. Since the Government's claim merged in its judgment, to apply the state statute would be to destroy the claim and leave the United States powerless to recover on appellee's indebtedness to it. Even under this Court's limited reading of the scope of Summerlin, state statutes plainly cannot be given that effect.

Since, therefore, the United States cannot sue on its underlying claim, if R.C.W. 4.56.210 can apply to the United States then it completely destroys not only the judgment but the claim which has merged into the judgment. Because, as this Court recognized, the Supreme Court has held that no state statute may so invalidate a claim of the United States, R.C.W. 4.56.210 cannot be applied to the Government. For this reason, the district court erred in holding that R.C.W. 4.56.210 could bar the Government's suit on its judgment against the Stanways.

2/ The common law rule is, of course, the rule in Washington. See Fisher v. Schwabacher Hardware Co., 109 Wash. 257, 186 P. 549 (1920).

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the judgment of the district court should be reversed.

BAREFOOT SANDERS,
Assistant Attorney General,

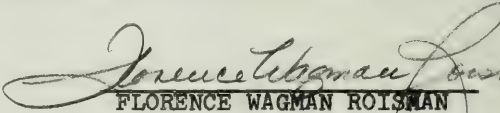
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Washington, D. C. 20530.

FEBRUARY 1967

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing, is, in my judgment, well founded and presented in good faith, not for the purpose of delay.


FLORENCE WAGMAN ROISMAN
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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 1967, I air mailed five copies of the foregoing petition for rehearing, postage prepaid, to counsel for appellees, addressed as follows:

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No. 20219

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IN THE
**United States Court of Appeals
For the Ninth Circuit**

PALMBERG CONSTRUCTION CO.
an Oregon corporation,
Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

**APPELLANT'S BRIEF IN REPLY
AND REPLICATION**

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FILED

DEC 1935

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 20219

PALMBERG CONSTRUCTION CO.,
an Oregon corporation,

Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,

Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S BRIEF IN REPLY
AND REPLICATION

PREFACE

This brief is a consolidation of Simpson Timber Company's answer to the Palmberg Construction Co.'s opening brief in support of its appeal and reply to the Palmberg Construction Co.'s answering brief to Simpson's opening brief. Inasmuch as Simpson is both appellant and appellee and Palmberg is both appellant and appellee, the parties herein will be referred to as Simpson and Palmberg. Simpson will follow the procedure adopted in its opening brief (because of consecutive paginations) and refer to references in the reporter's transcript as Rt. and references in the clerk's transcript as Ct.

SUMMARY OF ARGUMENTS

Palmberg has failed to accept and comply with a fundamental axiom of litigation—that is, that the burden of proof is upon the plaintiff. Instead, Palmberg, which was the plaintiff in the lower court, has proceeded on

the assumption that Simpson (the defendant) has the burden of proof to show that Palmberg's unsupported allegations are not true. Although Rule 18, 2(e) of the Rules on Appeal of this court requires that references to facts in briefs be supported by specific references to the record, Palmberg's brief in its most pertinent portions fails to comply with this rule. Palmberg has cited legal authorities in support of its proposition which will not withstand even a cursory scrutiny. Simpson frequently stated in its opening brief that *there is no evidence in the record to support the allegations of Palmberg and certain of the instructions of the trial judge*, Palmberg has not refuted those statements of Simpson with any citations of evidence in the record. Instead, Palmberg's response has simply been that Simpson has cited only the evidence which is most favorable to it. *The reason for Palmberg's failure to cite evidence in the record or legal authorities supporting its propositions is simple. They do not exist.*

Reply to Palmberg's Assignment of Error No. 1

In this assignment of error, Palmberg alleges that the court erred in refusing to grant its request for interest on the sum of \$16,187.00 tendered to it by the Simpson Timber Company on November 6, 1961. It is the contention of Palmberg in its brief that Simpson withheld payment of this amount because of an unliquidated counterclaim. This contention is not true. Simpson did not withhold payment of this amount, but in fact tendered it to Palmberg (Pl. Ex. 18) which refused to accept the money for the reason that apparently it did not consider \$16,187.00 a liquidated amount (Pl. Ex. 19). On this basis the trial judge refused to grant Palmberg's request for interest.

Interest anterior to judgment is not allowable in the State of Washington unless the amount in controversy is a liquidated amount.

"I think it may be stated that interest is allowable when a claim is stated, or liquidated as to amount. *A stated account is an agreed balance. An account which has been examined by both parties* (1 Bouv. Law Dict. 109) . . . '*Liquidated*' means declared by the parties to be the amount)." (Emphasis supplied). *United States v. Skinner and Eddy Corporation*, 28 F.2d 373 (9th Ct. of App., 1928) at p. 385-386.

Accordingly, the above amount, \$16,187.00, could not have been a liquidated amount upon which Palmberg is entitled to interest anterior to judgment unless both parties agreed to it. There is no question but that Simpson believed that all it could possibly owe Palmberg was \$16,187.00, but, this amount was tendered to Palmberg Co. *only* in full payment of Simpson's obligations under the contract:

"We, therefore, enclose our check in the sum of \$16,187.00 *as payment in full of all obligations of Simpson to you arising out of its Purchase Order No. 52471-PE, dated January 12, 1960, as amended by Supplemental Purchase Order dated February 17, 1960.* (The written contract.) Should it be unacceptable on that basis, we request it be promptly returned." (Pl. Ex. 18). (Emphasis supplied)

This tender did not require that Palmberg by accepting the check would waive all of its rights, if any, against Simpson, not arising out of the contract (such as claims for work done but not provided for in the contract) nor did Simpson represent that the figure of \$16, 187.00 was arrived at by deducting an unliquidated counterclaim. Simpson only requested that the amount be accepted as full payment under the contract with no offsets.

Palmberg cites the case of *Walla Walla Port Dist. v. Palmberg*, 280 F.2d 237 (9th Ct. of App. 1960) in support of its right to interest on the sum of \$16,187.00. What Palmberg has failed to recognize is the clear distinction that the court drew at p. 241 of its decision:

that is, the distinction between a tender of payment represented to be payment in full for all work performed, and a tender of payment represented to be payment only for work done under a contract. It is the latter type of tender that was made by Simpson.

Palmberg never billed Simpson for \$16,187.00. Palmberg refused to agree that the sum constituted full payment under the contract; how could the \$16,187.00 constitute a liquidated amount upon which Palmberg is now entitled to interest?

It is particularly anomalous and inconsistent that Palmberg should now take the position that this amount was liquidated. Palmberg, prior to the trial and during the trial, attempted to prove that Simpson had made a mistake in computing the \$16,187.00 because it had not credited Palmberg with the full amount of materials contained in the fill area.

In addition, Palmberg submitted evidence purporting to show the amount of the work it did, nature of the work and the value of its services.

“... If evidence is necessary to establish the amount of the claim, then interest anterior to judgment is not allowable. ‘Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished or the value of the services rendered, interest will not be allowed prior to judgment.’ *Wright v. Tacoma*, 87 Wash. 334, 353, 151 Pac. 837; *Lloyd v. Am. Can Co.*, 128 Wash. 298, 314, 222 Pac. 876; *Brewster v. State*, 170 Wash. 422, 424, 16 P.2d 813”; [*Hansen & Rowland v. C. F. Lytle Co.*, 167 F.2d 170 (9th Ct. of App., 1948).]

The trial court correctly refused to grant Palmberg interest anterior to judgment, for there never was a liquidated amount upon which interest could be computed.

Reply to Palmberg’s Assignment of Error No. 2

In its Assignment of Error No. 2 Palmberg argues that

it was prejudiced by the pretrial judge's order granting in part and denying in part defendant's motion for summary judgment (Ct. 134). Palmberg's arguments supporting this assignment of error are somewhat difficult to follow. They appear to be, (1) that the partial summary judgment was only interlocutory and, (2) because of the order it was prevented from submitting evidence to the jury.

It is difficult to understand how Palmberg was prejudiced because of the fact that the partial summary judgment entered by the court (Ct. 135-136) was interlocutory in nature rather than final. The burden was upon Palmberg to convince the trial judge that, if it was prevented in any manner from introducing evidence in support of its cause, that the partial summary judgment should be relaxed or modified. In actual fact, Palmberg was not prohibited by the trial judge from introducing any evidence at the time of trial on the basis of the partial summary judgment although Simpson argued strenuously that certain evidence submitted by Palmberg did in fact fall within the prohibitions of that partial summary judgment. Palmberg has not cited this court to one instance in the record where the trial court sustained an objection to its evidence because of the partial summary judgment, nor has Palmberg cited one instance in the record where it made an offer of proof of evidence excluded by the partial summary judgment.

The second argument of the Palmberg Construction Co. in its support of this assignment of error is that it was precluded by the partial summary judgment from introducing evidence in support of its cause. As pointed out above nothing can be further from the truth. On page 20 of its brief, the Palmberg Construction Co. states:

"By reason of this order Palmberg at trial was not permitted and did not attempt to introduce its evi-

dence of what it had been told by Simpson as to the nature of the materials and the quantities and amounts in the areas originally designated.”

This statement by Palmberg is not true. The trial court specifically ruled that Palmberg could introduce any such evidence in order to show a breach of duty on the part of Simpson (Rt. p. 40, L. 21-p. 42, L.22), however, no such evidence was even introduced. (Simpson’s opening brief, p. 45).

Palmberg suffered no prejudice by the entry of the partial summary judgment.

Reply to Palmberg’s Assignment of Error No. 3

It was and is Simpson’s position that Palmberg breached its contract because it failed to complete the work within the time provided in the contract. The factual matter with respect to the time for completion are not in controversy. After the original documents comprising the contract were executed, Palmberg, by its letter of February 5, 1960 (Pl. Ex. 9) offered to bring another dredge on the job under certain terms and conditions. Simpson did not accept this offer, but rather submitted to Palmberg its purchase order dated February 17, 1960 (Pl. Ex. 10), which specifically conditioned the modification of the original agreement requiring the addition of a second dredge as follows:

“Supplemental to the terms and conditions included in Purchase Order No. 52471-PE for fill by hydraulic dredging, the following additional terms are added to cover the operation of a second 12-inch dredge *in order to permit completing of the fill operation by June 1, 1960.*” (Pl. Ex. 10.) (Emphasis supplied)

These terms and conditions were added for one purpose and one purpose only, to permit completing the fill operation by June 1, 1960. Palmberg accepted Simpson’s counter-offer by supplying a second dredge to the job

and by billing Simpson for an additional \$4,500.00 mobilization charge (Rt. P. 762, L. 10; P. 763, L. 6). The law is quite clear that an offer which calls for the doing of a particular act by the offeree may be accepted by performance of that act. 17 C.J.S. *Contracts*, Sec. 41(d), p. 668.

The trial court's failure to rule as a matter of law that the contract provided for a completion date, and its leaving that portion of the contract for the jury's construction was clearly beneficial to Palmberg rather than prejudicial. The failure of the trial court to instruct the jury that the contract provided for a June 1, 1960, completion date is an additional example of how the instructions given were prejudiced in favor of Palmberg and deprived Simpson of its substantial rights.

Replication on Simpson's Assignment of Error No. 3

In Simpson's Assignment of Error No. 3 (Simpson's opening brief, p. 30), Simpson urged error to the court's Instruction No. 7.

Palmberg in its brief has cited no authorities in support of this instruction for the simple reason that there are none. As pointed out in Simpson's opening brief (p. 30), this instruction does not state the law.

Palmberg attempts to justify this instruction by arguing that there is evidence in the record of Palmberg's inquiries with respect to the included matters, and that there is evidence that Simpson failed to make a full disclosure. Palmberg supports these arguments only by untrue statements and misrepresentations of the record.

At page 28 of its brief, Palmberg represents that there were presumably records of prior dredging work available to Simpson which Simpson made no effort to review and never produced. Palmberg has failed to inform the court that there were no such records available to

Simpson (Rt. 125), but in fact Simpson did make available to Palmberg prior to the time that the contract was actually executed, its engineer, Mr. John Sells, who was familiar with the prior dredging work (Rt. 802).

Mr. Sells, who was not employed by Simpson at the time of trial, testified as follows:

“Q. For what reasons were you introduced to these contractors?

“A. *Well, because I was familiar with the ground, and I had worked on the previous dredging.*” (Rt. p. 802, L. 11-20)

At page 28 of its brief, Palmberg states that Simpson failed to disclose to Palmberg the fact that there were not 350,000 cubic yards available in the primary dredge area. This is not true. It was the testimony of Oliver Ashford, Simpson’s engineer, that this fact was revealed to Palmberg prior to the contract (Rt. p. 153) and there is no controversy that accurate cross-sections showing the exact amount of materials in the primary dredge area were furnished to the Palmberg Construction Co. prior to commencement of its operations (Rt. p. 444, L. 2-6, p. 442, L. 25—p. 443, L. 25). At page 29 of its brief, the Palmberg Construction Co. states:

“Simpson’s engineer testified that he told Palmberg prior to the formation of the contract that Simpson had no knowledge of any piling.”

This statement is misleading. The actual statement of Simpson’s engineer was:

“Q. Then what specifically did you advise Mr. Palmberg about the possibility that there might be some buried or submerged piling in there?

“A. Well, that was the same statement that we gave to all the bidders, that while we had no knowledge of any piling, *it is possible that there are some that are broken off and eaten down to the gravel line of the fill.*” (Rt. 226, ll. 1-8)

Although as Palmberg has indicated at page 29 of its brief, Simpson acknowledged that some of the buried piling encountered by Palmberg in its operation were part of an old railroad trestle, Palmberg introduced not a scintilla of evidence that Simpson knew of this fact prior to the time that dredging was done by Palmberg. In fact, Palmberg itself discovered that this piling was part of an old dock (Rt. 549, ll. 11-13). The testimony of Palmberg's witness was that the pilings were driven in the 1800's (Rt. p. 549, ll. 11-13), which was substantially prior to the time that Simpson had any operations in the Shelton area (Court's Instructions to Jury, p. 12, Admitted Fact No. VIII).

At page 29 of its brief, Palmberg states:

"Specific inquiry as to the nature of the materials was made by Palmberg." (Rt. 103-104)

Obviously this statement was made in an effort to show that inquiry was made by Palmberg with respect to the matters included in the instruction. This statement by Palmberg is not true. The only evidence of inquiry is testimony by H. G. Palmberg (Rt. 103-104) as follows:

"I raised the question about the possibility of cobbles of a larger size, running into boulders, whether or not these might prevail at greater depths in the area proposed to be dredged . . ." (Rt. 103, ll. 11-15)

Palmberg has cited no evidence in the record tending to prove either directly, circumstantially or impliedly that Simpson's response to this question was not truthful and to the full extent of its knowledge, nor has it cited the court to any evidence in the record showing that it encountered "cobbles of a larger size" at greater depth during its dredging operations. Palmberg's own dredge operator testified:

"We didn't have any shut downs as I remember on materials, sand and gravel materials too large to go through our pipe." (Rt. p. 557, ll. 14-16)

Clearly, the above inquiry and Simpson's response cannot support the instruction urged as error.

At page 30 of its brief, Palmberg Construction Co. states:

"The jury was also clearly entitled to find that Simpson knew or should have known much more about the nature of the materials and the likelihood of substantial obstacles being encountered in the areas than was included in those disclosures which it elected to make."

The Palmberg Construction Co. has not pointed to one disclosure made by Simpson which was not full and complete to the best of its knowledge.

Palmberg's argument against Simpson's Assignment of Error No. 3 is contrived without concern for the truth. At pages 18 and 19 of Palmberg's brief, where a contrary proposition is in its favor, Palmberg argues as follows:

"... The written contract contained no warranties with respect to the quantity not only of trash, but of such obstacles as sinker logs, concrete blocks, buried and submerged piling and other foreign objects encountered. Obviously, the written contract contemplates no such possibility and itself contained no warranty with respect to the absence or presence of such conditions, *which were obviously unknown at the time to either of the parties.*" (Emphasis supplied)

This statement of Palmberg's which is wholly inconsistent with its reply to Simpson's Assignment of Error No. 3 constitutes an admission by Palmberg Construction Co. that there is no evidence in the record showing prior knowledge on the part of Simpson Timber Company. The fact that the parties were unaware of such conditions did not, however, prevent them from making provisions in the written contract for their occurrence (Df. Ex. A1, p. 2).

Replication on Simpson's Assignments of Error No. 4 and No. 5

Palmberg attempts to justify the trial court's giving of Instructions No. 20 and No. 22 by citing the case of *Walla Walla Port District v. Palmberg*, 280 F2d 237 (9th Ct. of App. 1960) (P. 31 of Palmberg's brief). The *Walla Walla Port District v. Palmberg* case was one in which the Palmberg Construction Co. (then a proprietorship owned by H. G. Palmberg who is the president, principal owner and operator of Palmberg Construction Co., a corporation) alleged that the Walla Walla Port District had certain information with respect to sub-surface conditions which was not revealed even though Mr. Palmberg made specific requests for such information. At the trial of the *Walla Walla Port District* case, it became clear that in fact the Walla Walla Port District did have information which it had not revealed to Mr. Palmberg. It is of interest to note that Mr. Palmberg in this action has made allegations and representations in the pretrial order and the proposed statement of the case to the jury which are almost identical with those made in the *Walla Walla Port District* case. However, from an examination of the record in this case, it becomes clear that the *Walla Walla Port District* case and the present case are not similar. The record in this case does not show that Simpson Timber Company withheld any information it possessed from Palmberg (as Palmberg has admitted at page 19 of its brief) nor does the record in this case show that Mr. Palmberg made inquiry which was not truthfully answered.

The contract made specific provision for the occurrence of debris in Palmberg's dredging operations. Palmberg is not entitled to additional compensation for doing that which it contracted to do.

Palmberg in its brief makes frequent reference to the case of *Walla Walla Port District v. Palmberg*, *supra*, as

supporting many of its arguments. The *Walla Walla* case is factually distinguishable from the present case. However, an examination of the *Walla Walla* case is helpful for in the comparison between that case and the present case it becomes very apparent that Palmberg has virtually left no stone unturned in unsuccessfully twisting the facts of this case to make it merely a retrial of his *Walla Walla* case.

Replication on Simpson's Assignments of Error No. 6 and No. 7

Palmberg in its brief has given no citations of authority or any argument containing merit in opposition to Simpson's Assignments of Error No. 6 and 7. Therefore, no further argument is considered to be necessary.

Replication on Argument on Assignment of Error No. 8

Palmberg cites no evidence in the record to support Instruction No. 27 other than a reference to Pl. Ex. 25 which is Palmberg's letter of November 3, 1960 and Pl-Ex. No. 12, Palmberg's letter of February 20, 1961. Examination of both of these letters readily demonstrates that neither of them constitutes a demand for additional compensation, or, in fact, allege a change in circumstances from those provided for in the contract. Neither of these letters sets out any terms of the alleged implied agreement. On p. 34 of Palmberg's brief, Palmberg states that "the jury was entitled to find that from that point forward Palmberg (obviously with Simpson's acquiescence) ceased billing at the contractual rate to await a final settlement." Palmberg cites no evidence in the record to support this statement which is simply not true. The record clearly indicates that immediately prior to Palmberg's November 3, 1960 letter it had been notified by Simpson that its billings were some 80,000 yards in excess of the actual amount of yardage placed in the fill and that its billings should be accordingly reduced (Pl. Ex. 11). Palmberg would now have the court believe

that subsequent to this notification, it withheld further billings to Simpson simply because it expected a final settlement, providing for additional compensation, apparently *ex contractu*. This is a flagrant misrepresentation on the part of Palmberg for the record specifically designates the reason why billings were withheld. Palmberg's monthly statements to Simpson set forth the reason why billings for yardages pumped were in fact withheld:

"Payment under this item to be held in abeyance pending resolution of final total yardage." (Pl. Ex. 31, statement on Nov. 7, 1960)

This same notation is found in Palmberg's billings to Simpson of December 5, 1960 and January 27, 1961 (Pl. Ex. 31). These statements of Palmberg clearly demonstrate the reason for withholding yardage billings, and Palmberg should not be permitted to mislead the court on this issue.

The most fatal defect, however, in Palmberg's argument in favor of an implied contract, is that it has not cited (and cannot cite) any evidence in the record of conduct on the part of Simpson which would support an implied agreement. The law of the State of Washington respecting this question has been stated as follows:

"It has been repeatedly held in Washington that, to prove an implied contract the party claiming the benefit of such a contract must establish that there was a meeting of the minds of the parties on the terms of the implied contract . . ." (Citing cases)

Asheim v. Pigeon Hole Parking, Inc., 175 Fed. Supp. 320, 330, *aff.* 283 F.2d 288 (D.C. Ed. Wn. 1959, *aff.* 9th Ct. of App. 1960). See also *Kellogg v. Gleason*, 27 Wn.2d 501, 178 P.2d 969 (1947); *Ross v. Raymer*, 32 Wn.2d 128, 201 P.2d 129 (1948); and *Johnson v. Nasi*, 50 Wn.2d 87, 309 P.2d 380 (1957), where the court held at p. 91:

"The burden of proving a contract whether ex-

pressed or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.”

Although Palmberg would like the court to find an implied contract, it has not, and cannot cite any evidence of such a contract.

Replication on Simpson's Assignment of Error No. 9

Palmberg at p. 36 of its brief states that Simpson admitted during trial that it was mistaken with respect to some information. Palmberg's reference is to page 153 of the transcript. An examination of that page of the transcript and other evidence submitted clearly shows that Simpson was not mistaken at the time the contract was actually entered into with respect to the indicated matter (Rt. p. 154-155, Pl. Ex. 8, Pl. Ex. 6 a-j). There could not have been a bona fide mutual mistake. The record further indicates that although Simpson may not have had actual knowledge of some subsurface debris, it warned Mr. Palmberg and other bidders that they should be aware of the possibility that such debris could be encountered (Rt. 226).

Although it may be that neither party was aware of debris which might be encountered, they made provision for the possibility of encountering it in their contract (Df. Ex. A 1 at p. 2).

The Washington Supreme Court in the case of *Thiel v. Miller*, 122 Wash. 52, 58, 209 Pac. 1081, 1084 (1922) held:

“This is not a case of mistake of either party in erroneously consciously assuming as a fact that which was not a fact, . . . but it was a case of all parties voluntarily entering into a contract in the face of their conscious, present want of knowledge of facts, which they all then manifestly concluded would not influence their action or induce them to refrain from entering into the contract whatever the facts might

be. We are of the opinion that there is no such mutual mistake here shown as to entitle appellants to a rescission of the contract..."

This principal is applicable in the present case.

In addition, there is absolutely no testimony in the record that Mr. Palmberg nor anyone else with Palmberg was unaware of the possibility of encountering these difficulties, and, in fact, Palmberg's dredge superintendent stated while on the witness stand that the obstacles encountered in the course of the dredging operation were quite ordinary to an area such as the Shelton Harbor (Rt. p. 548, ll. 18-20, Rt. p. 560).

The Palmberg Construction Co. has cited no evidence which would support the court's instruction on mistake.

Replication on Simpson's Assignment of Error No. 10

Palmberg, in its reply to Simpson's Assignment of Error No. 10, has for the first time throughout the course of this litigation attempted to draw a distinction between the word *debris* as used by the parties in the consummation of the contract and during the course of the dredging, and *debris* as Palmberg would now have the court believe that the word *debris* should be defined. Palmberg at the time it executed the contract and during the dredging operations intended the word *debris* to mean and in fact used *debris* to include all of the foreign obstacles and objects actually encountered in the dredging operations. In its letter of November 3, 1960 (Pl. Ex. 25), the Palmberg Construction Co.'s president, H. G. Palmberg, stated:

"... that it seems that a contributing cause to this has been to a great extent due to the unusual amounts of *forest trash*, such as *limbs, logs, piling, sticks*, etc., which we have encountered..."

In its letter of September 6, 1961 (Pl. Ex. 14) the Palmberg Construction Co.'s president, H. G. Palmberg,

the person who actually prepared the contract providing for the occurrence of debris, stated:

“Actually, in performing the work we encountered considerable quantities of *forest trash* (sic), particularly in the ferry channel area and in the Mill 2 site dredging area. Included in this *trash* was a considerable volume of *sunken logs* as well as *piling* that had been driven throughout the dredging areas, . . .”

In the September 6, 1961, letter (Pl. Ex. 14 at p. 4), the Palmberg Construction Co., in an itemization furnished to Simpson Timber Company, listed time loss attributable to debris encountered, including piling, logs, cement blocks, etc., as follows:

“Actual pumping hours lost directly due to the encountering of forest *debris*, as submitted to you in previous tabulations . . .”

The Palmberg Construction Co.’s dredge superintendent referred to the obstacles encountered during Palmberg’s dredging operations as “*ordinary debris*” (Rt. 548, ll. 13-17).

Clearly, at all times up until the filing of its brief, Palmberg included within the meaning of *debris* all the obstacles it encountered during its dredging operations for Simpson. Now in order to prevail, it must inconsistently distinguish between *debris* and other items.

It is interesting to note in *Walla Walla Port District v. Palmberg, supra*, in which the president of the present plaintiff corporation, H. G. Palmberg, was the plaintiff, Mr. Palmberg also made the allegation that he was entitled to additional compensation because of encountering certain foreign obstacles in the course of his dredging operations. His contract with the Walla Walla Port Commission made provisions for encountering “debris” as did Palmberg’s contract with Simpson. In that case the “debris” consisted of asphalt paved roadways,

trees, fence posts, telephone poles, wire, etc. In the *Walla Walla Port District v. Palmberg* case, Mr. Palmberg was denied recovery for the difficulty he encountered in removing this debris because of the contract provisions. In this respect the *Walla Walla Port District v. Palmberg* case is factually similar to the present case. Mr. Palmberg knew the meaning of debris when he prepared the contract between the Palmberg Construction Co. and the Simpson Timber Company and these matters were provided for.

Palmberg is not entitled to any additional recovery because of debris encountered.

Replication on Simpson's Assignment of Error No. 11

In the first of its arguments on this assignment of error Palmberg attempts to show why the actual specifications for the job (the cross-sections Pl. Ex. 6a-j) cannot be incorporated in the contract. According to Palmberg's argument these cross-sections were only to be used for measuring the fill area. A simple reference to the contract shows that no such intention is apparent. The provision of the contract is:

"Plats or cross-sections of surveys shall be given to us for checking before dredging commences and within thirty days after completion of the dredging operations." (Df. Ex. 1, p. 2)

There is no provision that these cross-sections would be limited only to the fill area.

When construing contracts the intention of the parties controls and the interpretation which the parties have placed on it will be given great if not controlling weight. *Kennedy v. Weyerhaeuser Timber Company*, 54 Wn2d 766, 344 P.2d 1025 (1959); *Fancher v. Landreth*, 51 Wn.2d 297, 317 P.2d 1066 (1957).

The interpretation that the parties place upon this provision of the contract is clear. A simple examination

of the cross-sections (Pl. Ex. 6a-j) shows that those cross-sections include both the fill *and the dredging areas*. In addition, Palmberg actually dredged the eastern areas shown on those cross-sections exactly as they are set forth and no objection thereto was made until some time after the commencement of this litigation.

In support of its second argument to this assignment of error, Palmberg cites the court (Palmberg's brief, pp. 44-45) to cases holding that where plans and specifications of work to be performed under a contract misrepresent conditions or the work to be done, the contractor may recover for resulting extra work or expense. Palmberg has failed to inform the court, however, that in each of the cases it cites, the plans or specifications in controversy were actually embodied in and made a part of the written contract. In the present case, the contract (which was prepared by Mr. H. G. Palmberg, Palmberg's president, Rt. p. 91, ll. 12-14) contains no reference whatsoever, either collaterally, indirectly, or impliedly, to Plaintiff's Exhibit No. 2. *The only reference to plans or specifications contained within the contract which was prepared by Mr. Palmberg is to the cross-sections (Pl. Ex. 6a-j) which were in fact furnished to Mr. Palmberg for checking before dredging commenced.*

Simpson does not believe the contract between it and Palmberg contains any ambiguity with reference to its incorporation of the cross-sections (Pl. Ex. 6a-j). However, if there is such an ambiguity it must be construed in favor of Simpson and against Palmberg. *Osborn v. Boeing Airplane Company*, 309 F.2d 99 (9th Ct. of App., 1962); *Sunset Oil Co. v. Vertner*, 34 Wn.2d 268, 208 P.2d 906 (1949); *Wise v. Farden*, 53 Wn.2d 162, 332 P. 2d 454 (1958); *Caterpillar Tractor Co. v. Collins Machinery Co.*, 286 F.2d 446 (9th Ct. of App., 1960).

**Replication on Simpson's Assignments of Error
Nos. 12, 13, 14 and 15**

In its argument on these assignments of error, Palmberg follows the procedure it has adopted throughout its brief, and makes general, vague reference to evidence, but, with one exception, does not, as is required by Rule 18, 2(e), Rules on Appeal, United States 9th Court of Appeals, cite where in the record that evidence can be found. The reason for its failure to do so is apparent. There is no such evidence. Simpson respectfully submits that inasmuch as Palmberg has not conformed with the rules on appeal, its arguments on these assignments of error do not merit consideration by the court.

The one exception wherein Palmberg has cited evidence in the record allegedly supporting its position is found at page 51 of its brief. This evidence allegedly proves that certain slopes constructed by Palmberg contained many thousand more yards of material than were represented and credited by Simpson. The evidence cited (Rt. pp. 584-88, 806, 815, 940-941) does not establish the actual amount of materials contained within the slopes but is merely opinion evidence by Palmberg's witnesses that a slope such as that constructed by Palmberg, under certain conditions would be flatter than as represented by Simpson. None of the witnesses who gave the estimates and opinions actually measured the slopes. There is in the record, however, an actual, accurate survey of the angle of the slopes in question and the amount of material contained therein which was furnished to Palmberg in October of 1961(Pl. Ex. 33, Rt. p. 355). This exhibit was represented to be an accurate cross-section of the amount of material contained within the slopes and no objection was ever made by Palmberg to it (Pl. Ex. 11). Although Plaintiff's Exhibit 33 is the only actual evidence in the record as to the amount of material in the disputed slopes, Palmberg has not even referred the court to it.

As pointed out in Simpson's opening brief, the only recovery that Palmberg can have in this action under Washington law is extra costs it incurred in doing work other than that provided for in the contract (Simpson's opening brief, p. 28). Palmberg in its argument of this assignment of error cites no evidence in the record supporting the fact that it actually sustained extra costs. In fact, the record clearly shows, as pointed out in Simpson's opening brief (pp. 61-64) that no extra costs were sustained. The record also discloses that Palmberg did not place in the fill area as many cubic yards of material as Simpson was willing to pay for (Simpson's opening brief, pp. 66-67). Palmberg in its brief, at Appendix I, has attempted to set forth an index of yardages represented moved and placed. This index is in its most pertinent points completely unsupported by the record. Simpson has at Appendix I of this brief demonstrated the inaccuracies of Palmberg's Appendix I.

Replication on Simpson's Assignment of Error No. 16

In its argument to this assignment of error, Palmberg attempts to dismiss Simpson's counterclaim for damages in delay of completion on two grounds:

1. That the contract did not provide for a completion date, and
2. If it did provide for a completion date, it was waived by the Simpon Timber Company.

As pointed out in the Simpson opening brief, the contract did specifically provide for a completion date of June 1, 1960 (Pl's. Ex. 10). (See pp. 6-7, *supra*. The Palmberg Construction Co. in its brief has not cited the court to any portion of the record which would support its theory that this completion date was waived by the Simpson Timber Company. Its argument is without merit.

Respectfully submitted,

RYAN, ASKREN, CARLSON, BUSH & SWANSON
Attorneys for Appellant

APPENDIX I

Below is a copy of the Appendix I appearing in Palmberg's brief. Superimposed on those entries are Simpson's numbers corresponding with the notes below. These notes point out inaccuracies of the entries found on Palmberg's Appendix I.

AREAS	TO BE DREDGED	As per Information Furnished other Bidders (R. 231) from Simpson's Ex. 8	As per Information Furnished Palmberg by map (Ex 2)	As per Representation On P. 66 of Simpson Brief	AMOUNTS DREDGED FROM EACH AREA	As per Actual Testimony	OTHER SECTIONS EVER FURNISHED PALMBERG?
Primary	222,370 1	350,000	222,370 2	Unknown (R. 523) but prob- ably at least 222,000 (R. 520)	Yes		
Car ferry	8,370 (to minus 1.0) 3	25,000 (to minus 1.0) 4	35,000	35,000 to 40,000 (pre- trial, TR. 139) but dredged much deeper than -1.0) (R. 368)	Yes		
Substitute	155,000 3	Area not shown but Palmberg shown aerial, told 75,000 (R. 105)	80,000	Unknown (R. 516, R. 521, R. 522, R. 523)	No! (R. 526, R. 521, 522) 3		
Log pond (slip)	24,810 3	None 9	15,000	Unknown (R. 521) but prob- ably maximum of 15,000 (R. 521)	No! (R. 526) 11		
Log dump	None	75,000 (but agreed prior to contract Palm- berg not to dredge be- cause too trashy) (R. 105-110)	None	None	Yes! (R. 526) 12		
Extended (East of primary)	31,090 3	None	107,000	Unknown (R. 513, 522-523) 3	Yes (Including 31,000) 14		

1. This figure was furnished to Palmberg prior to the execution of the contract. (Rt. p. 153).

2. This figure was proven by testimony of H. G. Palmberg at the time of trial (Rt. p. 366, LL. 14-20) and is also proven by reference to the cross-section (Pl. Ex. 6 a-j).

3. Palmberg Construction Co. has not cited any reference to the record in support of this representation for the simple reason that there is none.

4. This figure would be correct if the car ferry channel were dredged to a minus 1.0 foot level and the plus 2000' line as indicated on Pl. Ex. 2 (Rt. p. 233, LL. 1—p. 325 L. 12). Palmberg did not so dredge the car ferry channel but in fact dredged the car ferry channel as indicated on the cross-sections.

5. The car ferry channel was dredged deeper than minus 1.0 feet at the specific request of Palmberg that it be allowed to do so (Rt. p. 427, L. 17—p. 428, L. 1).

6. This figure is correct, but no representation as to amounts available were made by Simpson. Palmberg requested that this area be substituted for another area which it considered too trashy to dredge (Rt. 88, LL. 2-7). Palmberg represented that it would take 75,000 yards from this area (Rt. p. 105, LL. 6-7).

7. At the time of taking of his deposition, Mr. Palmberg recalled that 75,000 to 80,000 yards were in fact removed from the substitute area. This deposition was read into the record at the time of trial when Mr. Palmberg's memory failed him (Rt. p. 517, LL. 1-22).

8. No cross-sections of the substitute area were fur-

nished for the reason that it was substituted at the request of Mr. Palmberg shortly before dredging operations were to be commenced.

9. The log slip area was part of the log dump area which was included on the Pl. Ex. 2.

10. Mr. Palmberg testified at the time of trial that a maximum of 15,000 yards were removed from this area (Rt. p. 520, L. 24—p. 521, L. 6).

11. Cross-sections of this area were furnished to Mr. Palmberg as part of the log dump area (Pl. Ex. 6 a-j).

12. Cross-sections of the log dump area were furnished to Mr. Palmberg, but since he had requested that he not be required to dredge in that area, they were marked obsolete on the copies furnished Palmberg. The cross-sections are Pl. Ex. 6 a-j.

13. This representation is untrue. Testimony at the time of trial proved that 107,000 yards of material were removed (Rt. p. 818, L.6—p. 819, L.5).

14. This statement is untrue and is not supported by the record. Reference to the cross-sections Pl. Ex. 6 a-j indicates approximately 100,000 yards of material available to be dredged in the area east of the primary area.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DALE E. KREMER
Of Counsel for Appellant

No. 20219

IN THE
United States Court of Appeals
For the Ninth Circuit

PALMBERG CONSTRUCTION Co.
an Oregon corporation,
Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S PETITION FOR REHEARING

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 20219

PALMBERG CONSTRUCTION Co.
an Oregon corporation,
Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S PETITION FOR REHEARING

**PETITION FOR REHEARING
ON THE QUESTION OF INTEREST**

In its decision in the above-entitled matter dated April 5, 1967, this Honorable Appellate Court reversed the judgment of the jury entered against the Simpson Timber Company (Cl. Tr. p. 244). In this decision, this Appellate Court concluded the \$16,187.00 Simpson Timber Company had tendered to the Palmberg Construction Co. was, in fact, the amount due to Palmberg under the existing contract:

"Here, the \$16,187.00 represented exactly the re-

maining amount owing and due Palmberg under the payment formula fixed in the contract" (Decision p. 10).

This Appellate Court then further concluded:

"That the sum represented a liquidated or determinable claim upon which interest should have been granted" (Decision p. 10).

Simpson Timber Company now petitions for a rehearing of this Appellate Court's conclusion that its tender of \$16,187.00 would not stop the running of interest thereon, or that interest would be due on that amount if, in fact, a jury should ultimately find it due and owing.

Grounds

I. This Appellate Court at page 11 of its decision has indicated Simpson Timber Company is precluded from arguing it made an unconditional tender to Palmberg of the \$16,187.00 because of a stipulation (actually an Admitted Fact) contained within the Pre-Trial Order. Simpson respectfully submits:

a. Notwithstanding the Admitted Fact, the uncontroverted evidence at the time of trial was that the tender made by Simpson on November 6, 1961 (Pl.'s Ex. 18) was unconditional. As this Appellate Court has pointed out in its decision, the trial court, until final judgment, remains free to interpret, alter, modify or even reverse pre-trial orders, summary judgments, etc. (Decision p. 8). Accordingly, the trial court was correct in holding that the tender made by Simpson was unconditional, and in denying interest to Palmberg. Its judgment in so doing should be affirmed.

b. The Admitted Fact referred to by this Appellate

Court in its decision does not in its terms refer to the tender relied upon by Simpson (Pl.'s Ex. 18). Simpson was not precluded from making both a conditional and unconditional tender. The evidence submitted at the time of trial was that an unconditional tender was made (Pl.'s Ex. 18). As a matter of law, the unconditional tender stopped the running of interest.

II. The petitioner, Simpson Timber Company, respectfully submits the \$16,187.00 never was a liquidated amount for the reasons:

a. Simpson only admitted the \$16,187.00 was the *maximum* amount it *could* owe under the contract.

b. Palmberg did not agree that \$16,187.00 was either the actual or the maximum amount due under the contract. It introduced a large volume of testimony at the time of trial in an effort to prove Simpson's calculation of the contract price did not correctly establish the actual or maximum amount due under the contract.

c. Palmberg's principal thrust in order to obtain a judgment against Simpson was that the contract should be ignored, and that it should receive compensation on a *quantum meruit* basis. Palmberg should not be allowed to take such a position and at the same time claim it is entitled to interest under a contract which it attempts to avoid.

III. The issues submitted to the jury in the cause, as set out in the Pre-Trial Order, specifically negate the argument that either party agreed the \$16,187.00 was due and owing. Those issues in the Pre-Trial Order are:

Issues of Fact

- No. 32. Is the plaintiff entitled to additional compensation in addition to that already paid it for the work performed?
- No. 33. If so, what is the total amount presently due plaintiff, and is plaintiff entitled to sales tax in addition to that amount, or is sales tax included therein?
(Cl. Tr. p. 178).

The issue in the lawsuit was whether or not Palmberg was entitled to more compensation than it had already been paid. It would be contrary to law and inequitable to allow Palmberg to recover interest on additional compensation tendered to it by Simpson in an effort to terminate the controversy.

Respectfully submitted,

RYAN, CARLSON, BUSH,
SWANSON & HENDEL
Attorneys for Petitioner

CERTIFICATE

I certify that in my judgment this Petition for Rehearing on the question of interest is well founded and is not interposed for delay.

DALE E. KREMER

NO. 20272 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAUDE BECKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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MAR 14 1967

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NO. 20272
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAUDE BECKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF THE PLEADINGS AND
FACTS DISCLOSING JURISDICTION.

On November 12, 1964, the Federal Grand Jury for the Southern District of California, Southern Division, returned a two count Indictment charging the appellant with violations of Title 18, United States Code, Section 2, and Title 21, United States Code, Section 174 (illegal sale of narcotics, concealment of illegally imported narcotics and aiding and

abetting). On November 30, 1964, the appellant entered his plea of not guilty as to each count. On January 19, 1965, trial by jury commenced before the Honorable John C. Bowen and on January 22, 1965, the appellant was convicted as to each count. On January 28, 1965, the appellant was sentenced to a five year period of incarceration on each count to be served concurrently. On February 3, 1965, a Notice of Appeal was filed. [C.T.2-4, 18-23,25,27] ¹.

The jurisdiction of the United States District Court for the Southern District of California, Southern Division, was based on Title 18, United States Code, Section 2 and 3231 and Title 21, United States Code, Section 174.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND RULES INVOLVED

A. Statutes:

Title 18, United States Code, Section 2, reads in pertinent part as follows:

1/ "C.T." Refers to Clerk's Transcript.

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
- (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 21, United States Code, Section 174, reads in pertinent part as follows:

Whoever fraudulently or knowingly.....receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any narcotic drug, after being brought in, knowing the same to have been imported or brought into the United States contrary to law.....

Whenever on trial for a violation, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the judge.

B. Rules:

Rule 29 of the Federal Rules of Criminal Procedure

reads in pertinent part as follows:

The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment... after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

III

STATEMENT OF THE CASE

A. Questions Presented

- I. The insufficiency of evidence to sustain conviction necessitates reversal.
- II. The insufficiency of evidence to sustain the judgment of conviction necessitates reversal as plain error despite the failure to renew the motion for acquittal at the close of all the evidence.

B. Statement of the Facts

On April 4, 1963, Gordon O. Dodge and Agent Richard Salmi of the Federal Bureau of Narcotics met appellant Robert Claude Beckett, who has previously been convicted of violation of California narcotic laws, at his television store in San Diego, California in

the early afternoon. [R.T. 5-6, 48, 137]. ^{2/}

They asked appellant for heroin and cocaine in large quantities. Appellant told them that he dealt primarily in marihuana but that he would provide a contact for them to purchase either heroin or cocaine. [R.T. 7, 49, 73].

Appellant called a person that he knew dealt in cocaine and heroin and used a prearranged code system in their conversation. As a result of this conversation appellant told them that there was no cocaine or heroin available. However appellant told them to call back around 9:30 that evening and at that time he should have cocaine and heroin located. [R.T. 8-9, 50, 74-76].

Around 9:00 P.M. on April 4, 1963, they made a telephone call to appellant. Appellant told them that there was no cocaine at that time. He gave them the name and number of an individual to call. [R.T. 10-11, 51-52, 77-80].

Mr. Dodge and Agent Salmi attempted, unsuccessfully to locate this individual. Around 9:30 P.M., they called appellant again told him that they had been unsuccessful in locating the cocaine and heroin peddler that appellant had previously mentioned.

^{2/} "R.T." refers to Reporter's Transcript.

They told appellant that they had \$400 to spend for cocaine and heroin and appellant told them to call back in a few minutes. [R.T. 11,52,81].

They called appellant again and appellant told them to call Jesse at a specific number and tell Jesse that appellant told them to call. [R.T.11-12,46,53,82-83].

Appellant called Jesse and told him that Mr. Dodge and Agent Salmi would be calling in order to arrange for the purchase of narcotics. Jesse prior to this call had not heard of or met Mr. Dodge and Agent Salmi. Jesse would not have had anything to do with Mr. Dodge and Agent Salmi if appellant had not called. [R.T. 57-58, 60-61,63].

Mr. Dodge and Agent Salmi called Jesse. Jesse told them that appellant had called and told him that they would be calling in order to purchase a quantity of heroin. They agreed to meet in San Diego and arrange for the purchase of heroin. [R.T. 12,44,53, 66,83-84, 102].

Mr. Dodge and Agent Salmi met with Jesse. He told them that he could get some heroin for them but that it would take a day or so. Jesse gave them a phone number where he could be reached. [R.T.53,55,59,67-68,83-84,91,101].

On the same day Jesse told Agent Salmi that appellant furnished him with customers for the purchase of narcotics. (R.T. 181 .

On April 6, 1963, Jesse was called again. Jesse said that he had the heroin and a meeting was arranged. They met and Salmi paid Jesse \$175 for an ounce of heroin. ^{3/} R.T. 59-60, 98, 101-103, 130 Exhibit A, 1, 1A, 1B and 1C.

On April 8, 1963, Agent Salmi and Agent Fuentes, a state narcotics officer, met with appellant at appellant's television store. Agent Salmi told appellant that he had purchased the heroin from Jesse and they were satisfied with it. They, along with Mr. Payne, a friend of appellant, discussed their desire to purchase several kilos of marihuana. Appellant at this time indicated knowledge of the procedure required to purchase marihuana

3/ Subsequent to the first meeting between Jesse and Agent Salmi on April 4, 1963, and prior to the sale of heroin on April 6, 1963, Jesse purchased the heroin involved in this case in Mexico. Mr. Dodge and Agent Salmi did not know that Jesse was going to, and in fact had, purchased the heroin in Mexico. R.T. 60, 90, 93, 96, 100 .

in Mexico and the illicit entrance of the marihuana into the United States. Evidently appellant agreed to aid them in purchasing marihuana. [R.T.142,148-149,269-272,274].

On April 11, 1963, Agent Fuentes called appellant and in veiled language they discussed whether or not marihuana was then available. On the same day around 10:00 P.M., Agents Fuentes and Salmi met with appellant and Mr. Payne at appellant's television shop. The purchase of marihuana was again discussed but no agreement was reached. It is to be noted that appellant during a part of the conversation which took place was smoking a marihuana cigarette. R.T.151,276,283-284,286-289.

On November 4, 1964, Agent Salmi and Customs Agent Maxcy met appellant at the television store. A discussion concerning narcotics took place. Agent Salmi reminded appellant that he had previously arranged for the purchase of "stuff" south of the border. Appellant told Agent Salmi that he remembered the heroin transaction. The discussion concluded when appellant was arrested for violation of federal law. R.T.99-101,301-302. ^{4/}

4/ It should be noted that the testimony of appellant on his own behalf differed materially with the testimony of law enforcement officials at the trial.

IV

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO PROVE APPELLANT'S KNOWLEDGE OF ILLEGAL IMPORTATION.

It is well settled that on Appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U.S. 60 (1942)

Stein v. United States, 337 F.2d 14 (9th Cir. 1964)

Considering the facts most favorable to the government, there can be no dispute that appellant aided and abetted the sale, transportation and concealment of the heroin as charged in counts one and two of the indictment. Since appellant does not contest this, no argument is made on the point.

Mathis, who sold the narcotics to Salmi, testified the narcotics were imported from Tijuana contrary to law R.T. 41, 60. The jury could reasonably infer appellant knew this.

Appellant made two prior attempts to furnish a source of heroin and one phone call was made in code in Agent Salmi's presence [R.T. 8-11, 50-53].

Was "Cal" or "Gal", that appellant called, the same as Mathis' friend, Caroline Walker mentioned by appellant R.T. 50,

64-65,200 . The jury might so find.

As soon as appellant learned Salmi and Dodge had \$400 to spend, he said "call me back in 15-minutes". He talked to Mathis during that 15-minutes period R.T. 51-53 . Because of the apparent relationship, it could not be too speculative to believe appellant was told that the heroin must be brought up from Tijuana.

Appellant admitted to Salmi later that he knew about the transaction R.T. 101 .

Appellant knew where Mathis lived. R.T. 205-207 . This was near the border. Mathis has known Beckett since 1962 R.T. 62 .

There is some circumstantial evidence from which the jury could find appellant smuggled the heroin into the United States.

Appellant goes to Mexico every Saturday and every Sunday. Since his marihuana conviction in 1948 he was required to, and did register with Customs officials at the port of entry. He was friends of Customs and they never searched him. He placed bets for them at the race track and didn't charge them for this service. R.T. 201-2, 212

The first contact with Mathis by Agent Salmi was April 4, 1964 on a Thursday (R.T. 48). If appellant wasn't bringing the heroin through, why wait until Sunday, April 7? Mathis told him to call on

Saturday and the heroin would be available. Mathis could have picked up the heroin (R.T.102) sooner, as near as he was to the border.

Agent Salmi and Agent Ellis of Customs were watching for Mathis to come through. Mathis never came through the line R.T.143.

Mathis was reluctant to say how the heroin got into the United States from Mexico.

Under cross examination of Mathis by Mr. Langford, the following occurred:

Question: And on that request you then went to Mexico and acquired narcotics? Is that correct?

Answer: Yes.

Question: You smuggled them across the border?

Answer: I got them across (R.T.41).

A further direct examination of Mathis was as follows:

Question: Where did you get that 14 grams of heroin?

Answer: It was purchased in Mexico.

Question: Do you know that it did come from Mexico?

Answer: Yes. R.T.60.

B. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND POSSESSION IN APPELLANT.

Possession is sufficient to convict unless explained to the satisfaction of the jury. See Title 21 United States Code, Section 174.

Appellant testified and didn't deny knowledge of illegal importation.

Possession may be actual or constructive, sole or joint, and may be proved by circumstantial evidence.

Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

Physical custody by an agent may be attributable to a principal.

United States v. Hernandez, 290 F.2d 86 (2nd Cir. 1961)

United States v. Posaris, 327 F.2d 56 (2nd Cir. 1964)

Arellanes v. United States, 302 F.2d 603 (2nd Cir. 1964), cert.denied, 371 U.S.930.

There was sufficient evidence for the jury to find that Mathis was the agent of appellant.

The close relationship between appellant and Mathis was no doubt considered by the jury as in Eason v. United States, 281 F.2d 818,821 (9th Cir. 1960).

The Court, in the Eason case, said the evidence of close

friendship and general conduct warrant a reasonable jury finding...
"that possession was joint".

A case very similar in its facts to this case is Espinosa v. United States, 317 F.2d 275 (9th Cir. 1963), where a purchase of narcotics was arranged in two telephone calls. Jessie Espinosa was found to have constructive possession of the heroin even though she did not have physical possession and was not present when the sale was completed by delivery.

Also, see Cellino v. United States, 276 F.2d (9th Cir. 1960)

The presumption should be favored particularly with respect to opium derivatives such as heroin. Opium poppies are not grown in the United States where marihuana may be grown here. Heroin may not be imported legally except for very limited purposes.

Marcella v. United States, 285 F.2d 322 (9th Cir. 1960)

Hernandez v. United States, 300 F.2d 114, 118 (Footnote 11)
(9th Cir. 1962)

Chavez v. United States, 343 F. 2d 85, (9th Cir. 1965)

Yee Hem v. United States, 268 U.S. 178

Caudillo v. United States, 253 F.2d 513, 515 (9th Cir. 1958)

Where the defendant is an important and integral part of the narcotic operation and not a mere casual aider and abetter, the jury

properly found the defendant to have had the requisite possession.

United States v. Panica, 290 F.2d 97 (2nd Cir. 1961)

It is not necessary that the aider and abetter have direct financial interest in the illegal sale of narcotics.

United States v. Manna, 353 F.2d 191 (2nd Cir. 1965)

cert. denied 384 U.S.975.

The jury was properly instructed.

Jury instructions are presumably followed, Tessier v. United States, 292 F.2d 460,467 (9th Cir. 1961).

The test is not whether the Court of Appeals would have found the defendant guilty, but whether a reasonable jury would have done so. Figueroa v. United States, 352 F.2d 587 (9th Cir. 1965)

The case of Jones v. United States, 308 F.2d 26 (2nd Cir. 1962) relied on so heavily by appellant, is clearly distinguishable on its facts.

Existing in the case at hand, but not present in the Jones case, was testimony of the narcotics being smuggled into the United States, and the person who smuggled the narcotics or knew of it (Mathis) testified. [R.T.60 .

The Court, in Jones, at page 33, gave considerable weight to the fact that the defendant was faced with a "situation that would

require him to explain away not his own possession but someone else's possession of them."

The Court further said "the absent principal who possessed the narcotics might have an explanation proving that they were legally imported or were of native origin. One charged as an aider and abettor to that principal might be convicted by his inability to rebut the presumption even though in fact the principal had not violated a penal statute at all."

The objections raised by appellant on the Jones theory appear to be cured in the instant case since the principal testified the narcotics were smuggled into the United States and was cross-examined at length on the subject by experienced counsel. R.T. 62-65 .

C. APPELLANT WAIVED HIS RIGHT TO RAISE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE.

Appellant made a motion for judgment of acquittal at the close of the government's case but failed to renew the motion at the close of the trial.

Appellant has waived his right to question sufficiency of the evidence on appeal.

Lupo v. United States, 322 F.2d 569 (9th Cir. 1963)

Hardwick v. United States 296 F.2d 24 (9th Cir. 1961)

Appellant having proceeded to put on a case after the government puts on its case in chief amounts to a waiver of his rights, if any, to a motion for judgment of acquittal at that time.

United States v. Calderon, 348 U.S. 160, 164 (footnote 1) (1954)

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Ege v. United States, 242 F. 2d 879 (9th Cir. 1957)

The facts in this case do not justify the finding of plain error. Though such a finding is clearly within the power of the Appellate Courts it is "a power rarely exercised".

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Bilboa v. United States, 287 F. 125 (9th Cir. 1923)

Similar restricted approaches to the plain error rule has been taken in other Circuits.

Johnson v. United States, 291 F.2d 150 (8th Cir. 1961)

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)

Where appellant was represented at the trial by retained and experienced counsel, it is submitted plain error should not be recognized so readily.

V

CONCLUSION

For the foregoing reasons, it is respectfully submitted
that the judgment in the Court below should be affirmed.

Respectfully submitted,

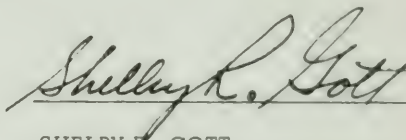
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United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, reading "Shelby R. Gott", written over a horizontal line.

SHELBY R. GOTT,
Assistant United States Attorney

N O. 2 0 2 8 9 ✓

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CENTRAL DIVISION

FILED

AUG 24 1967

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NO. 20289
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY E. PRATTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION AND
STATEMENT OF THE CASE

A. Pre-Trial and Trial Proceedings

On December 2, 1964, the Federal Grand Jury for the Southern District of California returned indictment No. 34322 charging appellant and Lucille Barbara Rodriguez in two counts with violation of Title 21, United States Code, Section 174 - Concealment of Illegally Imported Narcotics and Illegal Sale of Narcotics [C. T. pp. 2-3]. 1/

1/ "C. T." refers to Clerk's Transcript of record.

On December 14, 1964, appellant was arraigned in the United States District Court, at which time an attorney was appointed by the Court to represent the appellant and Lucille Barbara Rodriguez. On the same date both defendants entered pleas of not guilty to the charges set forth in the indictment, and the matter was continued to January 5, 1965, for further proceedings [C. T. p. 4].

On January 5, 1965, a new attorney was substituted for defendant Rodriguez. On motion of the United States Attorney, defendant Rodriguez' plea of not guilty was vacated and the matter as to this defendant was continued to January 18, 1965, for further proceedings. Appellant's jury trial commenced on January 5, 1965, before Honorable Peirson M. Hall [C. T. p. 5].

On January 7, 1965, appellant was found guilty as charged. An information of former conviction was filed and read to appellant. On the same date, appellant was sentenced to the custody of the Attorney General for ten years on Count One and ten years on Count Two, the sentences to run concurrently [C. T. pp. 6, 7, 24].

B. Post-Trial Proceedings.

On January 15, 1965, the Clerk of the District Court received appellant's notice of appeal without the required filing fee. On January 22, 1965, the District Court denied appellant's motions to appeal in forma pauperis and for bail pending appeal. Appellant renewed both motions in this Court. On August 5, 1965, this Court granted the motion to appeal in forma pauperis, and held that the

Notice of Appeal received by the Clerk on January 15, 1965, was timely. On the same date this Court transferred the motion for bail pending appeal to the District Court for determination on the merits. Pratti v. United States, 350 F.2d 290. Appellant's Notice of Appeal was ultimately filed on November 30, 1965 [C. T. p. 28].

The District Court had jurisdiction to try the case under Title 21, United States Code, Section 174. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTORY PROVISION

Title 21, United States Code, Section 174 provides in pertinent part:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had

possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

Defendant was charged in a two-count indictment with knowingly receiving, concealing, selling, and facilitating the concealment, transportation and sale of 10.870 grams of heroin knowing the same to have been illegally imported into the United States.

The Government presented the testimony of Edward M. Eastland, a chemist; Lucille Barbara Rodriguez, who was involved in the transaction; Henry Estrada, the buyer-informant, and Richard D. Rock and Chris V. Saiz, surveilling agents of the Federal Bureau of Narcotics. The defense presented only the defendant, Henry E. Pratti.

The evidence established the following facts. On the evening of August 6, 1964, Estrada, the informant (nick-named Rick), went to Barbara Rodriguez' house looking for her boyfriend, Alfred Hererra. Barbara told Rick that Hererra was in jail and asked what he wanted. Barbara testified that Rick then told her that he was "sick and hurting" and wanted to buy narcotics [R. T. p. 48:8-10]. ²

²/ "R. T. refers to Reporter's Transcript of record.

Rick denied saying anything more than that he wanted to purchase heroin [R. T. p. 107:15-17]. Rick told Barbara he wanted to buy half an ounce. Barbara, who was not an addict, told Rick that she didn't have any narcotics, but that she might be able to get some by calling a man. Rick asked her what the price would be but she did not know.

Then Rick took Barbara to a phone booth in the parking lot of a nearby market, from which she called the defendant. Barbara had previously called defendant on several occasions asking for narcotics, and each time defendant had refused [R. T. p. 70:21-22, p. 177:12-21; p. 178:11-22]. According to her testimony, she told defendant that Rick was sick and wanted "a piece or half a piece". whereupon defendant told her that the price would be \$110 [R. T. p. 49:9-16; p. 101:10-17]. Defendant then told Barbara that he might be able to get some narcotics, and if so he would come over to her house the following morning. Rick testified that after the phone call, Barbara told him the price would be \$110 [R. T. p. 108:1-5]. Rick drove Barbara home and then left to meet with agents of the Federal Bureau of Narcotics.

The following morning, August 7, Rick met with the agents again. They searched him and his car, and then gave him \$120 and installed a radio transmitter in his car. From that time until after the sale, Rick's car was under constant surveillance by the agents.

Rick then drove to Barbara's house again. He went in and asked if defendant had shown up. She said no. Rick suggested that they call him and she agreed. They drove over to the parking lot.

She called defendant from the phone booth, but there was no answer. Rick then suggested they go over to defendant's house and Barbara again agreed. They drove to defendant's house in Rick's car, bringing along Barbara's three children. When they arrived at defendant's house, Barbara went in while Rick waited in the car. Barbara testified she again told defendant that she had a sick friend, and also told him she wanted some narcotics for her boyfriend. Defendant told her he had nothing there, but he might be able to do something if they went into downtown Los Angeles with him. When they came out of the house Barbara introduced defendant to Rick as Hank [R. T. p. 49:24-25; pp. 75-80; pp. 111-115; pp. 137-143 pp. 161-179].

Defendant drove in his car to Fourth and Crocker Streets in Los Angeles; Barbara and Rick followed in Rick's car. Defendant parked in the vicinity of Fourth and Crocker Streets at which time he informed Barbara and Rick that he was going to look for his contact. Shortly thereafter defendant returned and stated he couldn't find him. He then drove to Fourth and Central, where he located his connection, who was known as John. According to the testimony of Agent Rock, who was surveilling this scene, John came out of the building at Fourth and Central as soon as defendant drove up, and went right over to defendant's car and talked to him [R. T. p. 145:16-25; p. 146:1-13]. Defendant testified that he told John that he had a friend who wanted to buy Heroin, and that they had \$110; in response, according to defendant's testimony, John told defendant that he thought he could get two "quarters" (of an ounce)

for \$110 [R. T. p. 181:2-12; p. 201:2-18].

Defendant then drove back to where Barbara and Rick were waiting at Fourth and Crocker Streets, to tell them that the sale was arranged and to get the money. According to defendant's testimony, Barbara had the money when he returned to Fourth and Crocker, and she got into his car without further ado and then gave him the money [R. T. p. 183:5-17]. However, according to the testimony of Barbara, Rick and Agent Saiz, who was listening to the radio transmissions from Rick's car, defendant came over to the car and asked for the money, but Rick refused because he feared getting "burned", that is, losing his money. These witnesses testified that a lengthy conversation between defendant and Rick ensued, in which it was decided that Rick would give defendant the money and Barbara would go with defendant to make the buy, leaving her three children in Rick's custody to guarantee the defendant's return [R. T. p. 54:12-18; p. 82:23-25; p. 83:1-6; p. 117:18-20; p. 118:1-6; p. 164:1-25].

The defendant and Barbara then drove back to Fourth and Central to pick up the connection, John. After defendant and Barbara picked up John, the three of them drove to City Terrace and Alma Streets in Los Angeles. During this trip, defendant was driving; defendant testified that John gave him directions as they drove [R. T. p. 186:7-13], but Barbara testified to the contrary [R. T. p. 84:20-21].

Upon their arrival at City Terrace, John got out of the car and was gone for 10-20 minutes. As he was returning, defendant

got out of the car to meet him. They met at the corner and had a brief conversation. The surveillance agent testified that they appeared to exchange something at this time, and then defendant returned to the car and John walked away [R. T. p. 148:1-12]. In conflict with the testimony of the surveillance agents, the defendant testified that John returned to the car with him, and that John handed Barbara the narcotics and she paid John [R. T. p. 137:1-10]. Barbara's testimony was that she does not remember John's returning to the car with defendant; nor does she remember defendant handing her the narcotics. She denied paying defendant any money [R. T. p. 58:16-19; p. 86:5-25; p. 87:1].

After the transfer was completed, defendant and Barbara drove back to Fourth and Crocker, where Rick was waiting. At Fourth and Crocker Barbara got into Rick's car and gave him the package of narcotics. Although Rick denied it [R. T. p. 130:17-23], defendant and Barbara testified that defendant and Rick decided to go back to Barbara's house where they both would take a fix [R. T. p. 66:6-8; p. 91:1-7; p. 188:4-20]. Defendant drove back to Barbara's house followed by Rick and Barbara. Barbara found that her stepfather was home so the two men could not take their narcotics. Defendant testified that Rick gave him enough narcotics for one fix and then left.

Defendant was arrested on November 2, 1964. Barbara Rodriguez was arrested on November 10, 1964.

IV

QUESTIONS PRESENTED

- A. THE DISTRICT COURT GAVE ONE OF DEFENDANT'S REQUESTED INSTRUCTIONS ON ENTRAPMENT, AND DID NOT ERR IN REFUSING TO GIVE THE OTHER.
- B. THE EVIDENCE IS SUFFICIENT TO SUSTAIN CONVICTION ON THE GROUND THAT DEFENDANT HAD ACTUAL POSSESSION OF THE NARCOTICS.
- C. THE DISTRICT COURT DID NOT ERR INSTRUCTING THE JURY ON CONSTRUCTIVE POSSESSION.
 - 1. Any Objection to This Instruction Was Waived by Failure of Trial Counsel to Object.
 - 2. The Evidence Warranted an Instruction on Constructive Possession.

V

ARGUMENT

- A. THE DISTRICT COURT GAVE ONE OF DEFENDANT'S REQUESTED INSTRUCTIONS ON ENTRAPMENT, AND DID NOT ERR IN REFUSING TO GIVE THE OTHER.
-

Defendant requested two instructions on the issue of entrapment. One was Mathes, "Jury Instructions", 27 F. R. D. 39 (No. 4.12). The other instruction requested (Defense's Proposed No. 2) was taken from United States v. Landry, 257 F.2d 425, 430 (7th

Cir. 1958), which proposed instruction read as follows.

"One of the defenses to the charges is that of entrapment. It is the duty of the Government to satisfy you beyond a reasonable doubt that the defendant was not entrapped into committing the acts which, absent the entrapment, constitutes the offenses. If the Government fails to convince you beyond a reasonable doubt that the defendant was not entrapped, into committing the offenses, then you must find the defendant not guilty on both counts of the indictment," [C. T. p. 9].

The Mathes instruction was given [R. T. pp. 279-280] but the special instruction was refused, and defendant made a timely exception [R. T. p. 292:4-21].

The appellant relies heavily on Notaro v. United States, 363 F.2d 169 (9th Cir. 1966), in urging that the Court erred in refusing to give his proposed special instruction. Appellant's reliance on Notaro is misplaced. In the recent case of Robison v. United States, ___ F.2d ___ (9th Cir., May 18, 1967, No. 20,752), this Court distinguished Notaro as follows:

"In strong contrast to the case before us, Notaro distinctly stated his objection to the instruction given, and made timely request . . . that the jury be instructed that if they should 'have any reasonable doubt from the evidence in the case as to whether the defendant

was the victim of an unlawful entrapment, the jury should acquit the accused.' [363 F.2d at 173.] The trial court refused Notaro's specific request so to instruct the jury; and it was this refusal, coupled with the instruction as given over Notaro's objection, that there led to reversal. . . .

"In the case at bar, on the other hand, appellant's only 'objection' to the entrapment instruction as given was: 'We would rather prefer the language in the case of United States v. Sherman.' "
(emphasis added).

In addition, said the court, Notaro involved a very close case of entrapment, while Robison was a strong case for the Government. Thus, as a result of (1) a failure to object to the Mathes instruction and (2) the fact that the entrapment issue was not a close one, this Court in Robison distinguished Notaro and affirmed.

The instant case falls squarely within the holding in Robison. Both of the key distinguishing factors relied upon by the Court in Robison are also present here. The first one was Robison's failure to "distinctly [state] his objection to the instruction given". Here, not only did defendant not object to the Mathes instruction, he specifically requested it [C. T. p. 8]. Thus, the instant case is considerably stronger for affirmance on this point.

The second distinguishing factor in Robison was the lack of a close question of entrapment. In the instant case, not only is it not a "close question of entrapment", but the evidence failed

completely to raise the existence of entrapment. No inducement of defendant by a government agent to sell narcotics occurred in this case. The record shows that the only discussion concerning the transaction between defendant and the informant prior to the delivery of the narcotics was not one to initiate the transaction, but was limited solely to overcoming the informant's fear of advancing money prior to the receipt of the narcotics [R. T. p. 54:12-12, p. 82:23-25; p. 83:1-6; p. 117:18-25; p. 118:1-6, p. 164:5-25]. This clearly does not constitute entrapment.

Thus, any unlawful entrapment of defendant in this case would have to have occurred through Barbara Rodriguez. Of course, any inducement of defendant by Barbara Rodriguez acting on her own initiative could not constitute unlawful entrapment. The defense of entrapment is available only to prevent the Government from inducing otherwise innocent persons into committing a crime.

Sorrells v. United States, 287 U.S. 435 (1932);

United States v. Sherman, 200 F.2d 880

(2nd Cir. 1952) (L. Hand, Jr.);

Sherman v. United States, 356 U.S. 369 (1958).

In other words, the entrapment defense is concerned solely with the activity of Government agents.

Gonzales v. United States, 251 F.2d 298

(9th Cir. 1958);

United States v. De Alesandro, 361 F.2d 694

(2nd Cir. 1966).

It can hardly be argued that Barbara Rodriguez, who was

originally indicted as a co-defendant in this case [C. T. pp. 7-8], was a Government agent of any sort.

Turning, then, to the informant's relationship with Barbara Rodriguez, the evidence is clear that the informant did no more than present the opportunity for the illegal transaction. The informant came to Barbara's house looking for her boyfriend [R. T. p. 103:18-23]. He told Barbara he wanted to "score" [R. T. p. 106:1-12]. She replied that she, too, wanted to "score" and that she knew someone who might be selling [R. T. p. 106:14-25; p. 107:1-10]. Thus, calling defendant was entirely Barbara Rodriguez' idea. It was she who spoke to defendant on the telephone [R. T. p. 49:9-10, p. 75:1-9; p. 77:12-23; p. 178:11-22]. And it was she who visited defendant in his home prior to the trip downtown that resulted in the sale [R. T. p. 179:8-24]. While the informant had not even known defendant [R. T. p. 125:10-18], Barbara Rodriguez had known him since April, 1964 [R. T. p. 176:18-20], and had several times asked him to sell her narcotics [R. T. p. 177:12-21; p. 178:11-22]. So if anyone induced defendant to sell narcotics it was Barbara Rodriguez, the defendant's accomplice.

In addition the evidence established that the defendant was not an innocent victim of Rodriguez's requests for narcotics. Defendant had a prior conviction under the narcotics laws [R. T. p. 174:18-24]. Barbara's boyfriend had previously told her to contact defendant for narcotics [R. T. p. 101:6-8]. Defendant quoted a price on the first phone call related to this transaction [R. T. p. 101:10-15]. He was himself a user and had been an addict [R. T.

p. 175:6-14; p. 191:8-14]. And by his own admission, this was not the first time he had been instrumental in arranging sales (R. T. p. 193:13-16).

In addition to the fact that no government agent induced appellant to make the sale of narcotics, there is an equally compelling reason why no issue of entrapment is raised by the evidence.

We would urge that in view of defendant's steadfast denials of guilt throughout his testimony, he was not entitled to any entrapment instruction at all. It is well settled that absent a crime there can be no entrapment, and therefore the defense of entrapment is only available to a defendant who admits committing the unlawful acts charged.

Ortiz v. United States, 358 F.2d 107 (9th Cir. 1966),
cert. denied 385 U.S. 861 (1966),
reh. denied 385 U.S. 983 (1966);

Ortega v. United States, 348 F.2d 874
(9th Cir. 1965);

Ramirez v. United States, 294 F.2d 277
(9th Cir. 1961).

It follows, then, that if there was any error in the instructions, it was favorable to defendant, insofar as the instructions placed upon the Government an unjustified burden of proof, regardless of what that burden was, to show an absence of entrapment.

B. THE EVIDENCE IS SUFFICIENT TO
SUSTAIN CONVICTION ON THE
GROUND THAT DEFENDANT HAD
ACTUAL POSSESSION OF THE NAR-
COTICS.

When considering the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the Government.

Barnard v. United States, 342 F.2d 309, 317

(9th Cir. 1965), cert. denied 382 U.S. 948

(1965), reh. denied 382 U.S. 1002 (1966);

Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964).

Papadakis v. United States, 208 F.2d 945

(9th Cir. 1954);

Glasser v. United States, 315 U.S. 60 (1942).

Viewed in that light, the testimony establishes that "RICK" Estrada paid the money to defendant, Pratti, at Fourth and Crenshaw Streets [R. T. p. 55:5-6; p. 82:23-25; p. 118:10-14; p. 164].

The defendant, Barbara and John drove to City Terrace and Alma Streets in Los Angeles [R. T. p. 186:7-13]. The defendant was driving, Barbara was seated in the middle of the front seat, and John was on the passenger side of the front seat.

John exited the vehicle and was gone for 10-20 minutes. As he was returning the defendant got out of the car without the narcotics, to meet him. They met at the corner and had a brief conversation. The surveillance agent testified that they appeared to exchange something at this time, and the defendant returned to the car and

John walked away [R. T. p. 148:1-18]. Upon their return to Fourth and Crocker, where Rick was waiting, Barbara handed Rick the narcotics.

Appellant argues that the evidence is "fatally incomplete" as it has not excluded the hypothesis that John returned to the car with defendant and that the transfer occurred at the passenger side of the vehicle, out of the view of the agents. We respectfully submit that this is simply not the case. At this crucial moment in the transaction, the agent testified that the car was under constant surveillance [R. T. p. 155:12-25; p. 156:1-7]; there were no gaps in the surveillance such as occurred in the case relied upon by appellant, United States v. Saunders, 325 F.2d 840 (6th Cir. 1964). Moreover, the agents were located on "a hill where you can look down on to where the Studebaker was parked" [R. T. p. 147:17-20]. The testimony further established that John was on the passenger side of the vehicle [R. T. p. 56:7-12; p. 84:1-5, 16-19; p. 147:1-3; p. 157:6-12; p. 186:1-13; p. 204:10-11; p. 205:7-10] and the surveilling agent was able to observe John get out of the car [R. T. p. 147:21-23]. Thus the agent clearly was able to see the passenger side of the car. We therefore submit that, assuming as we must, that the jury believed the surveilling agent, the evidence excludes all hypotheses that the transaction occurred on the passenger side of the vehicle, out of view of the surveilling agents, as proposed by appellant. As this Court said in Barnard v. United States, 342 F.2d 309 (9th Cir. 1965), at p. 317:

"We assume that the jury believes the . . . government

witness. It is for the jury, not this court, to decide what witnesses to believe."

C. THE DISTRICT COURT DID NOT
ERR IN INSTRUCTING THE JURY
ON CONSTRUCTIVE POSSESSION.

The court charged the jury as to both actual and constructive possession. Mathes, "Jury Instructions", 27 F.R.D. 39, 169 (No. 24.09) (Mathes) [C.T. p. 19; R.T. p. 286:5-25]. Defendant now objects to this instruction for the first time.

1. Any Objection to This Instruction
Was Waived by Failure of Trial
Counsel to Object.

A search of the record in this case failed to disclose any objection to the instruction on constructive possession. Such failure to object is a complete waiver.

White v. United States, 315 F.2d 113 (9th Cir. 1963).

cert. denied 375 U.S. 821 (1963);

Walker v. United States, 298 F.2d 217

(9th Cir. 1962);

O'Neal v. United States, 310 F.2d 175

(9th Cir. 1962).

The reasoning in the White case is particularly appropriate here:

"No point is made that the instruction is an

incorrect statement of the law, merely that it is not applicable to the facts of this case. Under such circumstances, it is peculiarly defense counsel's obligation to make timely objection." White v. United States, supra, p. 115.

2. The Evidence Warranted an Instruction on Constructive Possession.

Assuming, arguendo, appellant's contentions were to be believed that John delivered the narcotics to Barbara Rodriguez, the evidence independently establish constructive possession of the narcotics in appellant. According to the testimony of both Barbara Rodriguez and "Rick" Estrada, it was defendant who set the price for the sale [R. T. p. 49:15-16; p. 101:10-15; p. 108:1-5]. And it was defendant who directed the travels to downtown Los Angeles. Moreover, Barbara Rodriguez, "Rick" Estrada, and Agent Saiz all testified to the nature of defendant's discussion with Rick concerning the transfer of the money [R. T. p. 54:12-18; p. 82:23-25, p. 83:1-12; p. 117:18-25; p. 118:1-6, 10-14, 21-25, p. 119:1-5; p. 163:22-25; p. 164]. Agent Saiz' testimony concerning this discussion is particularly clear that defendant was the principal figure in the transaction and was exercising at that time his dominion and control over the narcotics:

" . . . he told Mr. Estrada that he would have to have the money before he could make delivery of

the heroin. . . . He told Mr. Estrada that the heroin was there, that it would not take much more than fifteen minutes to get the heroin." [R.T. p. 164, 6-11].

This is certainly not the attitude of a go-between who is merely putting a buyer in contact with a seller. Rather, we submit, this conversation makes obvious that defendant at that time had the power either to produce the narcotics (as he ultimately did) or to cancel the transaction, depending only upon whether or not Estrada was then and there willing to pay the price defendant was asking. Facts of a less compelling nature have previously been held by this Court to warrant affirmance where constructive possession was an issue.

Cellino v. United States, 276 F.2d 941

(9th Cir. 1960);

Dolliver v. United States, ___ F.2d ___

(9th Cir., June 16, 1967, No. 21,320).

CONCLUSION

In view of the foregoing, the District Court committed no error in refusing to give the appellant's proposed special instruction on entrapment. The facts warrant a finding of actual possession and sufficient facts existed to establish constructive possession. Therefore we respectfully submit that the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott
ROBERT M. TALCOTT

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN PUMICE COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,290

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN PUMICE COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The opinion of the district court (R. 375-396) is reported at 236 F.Supp. 44.

JURISDICTION

The jurisdiction of the district court over this condemnation action arises from the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, and the Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257 (R. 5). Final judgment

was entered March 8, 1965 (R. 446). Notice of appeal was filed May 7, 1965 (R. 452).^{1/} The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether in this condemnation valuation case there is any support in the objective facts or in law for the district court's award for pumice deposits arrived at by constructing a hypothetical pumice mining, processing and selling business; multiplying the assumed net profit per ton of that business venture by the estimated tons to be produced in five years; and returning the resultant figure directly as the market value of the deposits.

2. Whether the district court erred in rejecting all comparable sales.

STATEMENT

This appeal is from a judgment in two consolidated condemnation proceedings instituted by the United States to

^{1/} The delay in prosecuting this appeal was occasioned by the following facts: The American Pumice Company has been bankrupt since 1946. After the notice of appeal was filed here, the trustee in bankruptcy and the United States reached a settlement agreement, which was approved by the bankruptcy court. However, in an action by a stockholder, this Court, in P. S. Seymour-Heath v. George T. Goggin, Trustee, Etc., No. 21,868 (January 10, 1968), set aside the settlement for want of approval by the stockholder. The present appeal had been held in abeyance pending the outcome of that litigation.

acquire exclusive use of a large area of land in Inyo, Kern and San Bernardino Counties, California, for a Naval Ordnance Testing Station. The property interests involved are pumice mining claims on public lands of the United States. These claims had been located by various individuals and ultimately assigned or leased to the appellee, American Pumice Company.

The first condemnation action (Civil No. 3472) was filed on February 23, 1944 (R. 2). It embraced the "Brown Group" of claims (R. 376).^{2/} Orders for immediate possession, upon 30 days' written notice, were entered on February 24 and April 18, 1944 (R. 16, 24), and a declaration of taking was filed on October 19, 1945 (R. 52).

The second condemnation action (Civil No. 311) was instituted on March 20, 1945 (R. 160). It embraced the "Donna-Gill" claims (R. 376).^{3/} An order for immediate possession was obtained on March 30, 1945, and American Pumice Company vacated the premises on May 29, 1945 (R. 171, 380). On August 22, 1945,

^{2/} These include "Tired Boy," 160 acres; "White Gold," a group involving two overlapping 20-acre claims; "White Eagle No. 2," 20 acres; and "Gray Boy," 20 acres (R. 376).

^{3/} These include "Donna Nos. 3 and 4," 80 acres; and "Ray Gill No. 31," 160 acres (R. 376).

the project boundaries were revised by amended complaint to exclude Donna Nos. 3 and 4 and a part of Ray Gill No. 31 (R. 380). The court found that the amended complaint was never served on appellee and that appellee was not otherwise apprised of the filing (R. 380). The order of dismissal of these areas was not entered until September 24, 1956. The court found that no notice of this order was served on appellee. In 1946, one Mr. Splane, took a lease and option on these excluded claims from the original locators (Wicks and Gill) and operated the mines, making sales to the Navy. In these circumstances, the court held that under Rule 71A(i)(3), F.R.Civ.P., the appellee was entitled to compensation for a taking of them (R. 381-383).

The issue on appeal relates solely to the value of the claims. That issue was tried by the district court without a ^{4/} jury. As indicated, the United States owned the fee in these tracts and the American Pumice Company held leases or assignments from individual locators of mining claims. The lands are located in a remote and rugged area of southern California northeast of Los Angeles. They contain deposits of pumice useful in construction work.

^{4/} Various issues of ownership were also tried by the court, as shown by its opinion, but they are not raised here.

The Donna-Gill claims are about 50 miles away from the Brown claims (R. 385). Prior to the taking, there had been some open-pit production from the Donna-Gill claims and some (less) production underground from the Tired Boy and White Gold claims in the Brown Group (Tr. 364, 384, 441). This was marketed in the ^{5/} Los Angeles area.

Appellee's Valuations. Appraisal witnesses for the American Pumice Company gave opinions of value based on a capitalization of net profits from an operation which would mine, process and deliver bagged pumice f.o.b. to the nearest railhead at Sykes, California. ^{6/} Thus, the witness, Mr. Frederick, estimated the tons of pumice on the claims (Tr. 659-660, 680-698, 745, 939, 1064), the costs of building roads, bagging, sales promotion, etc. (Tr. 745, 1053, 1055, 1116, 1200), the amount of capital investment needed, annual production (Tr. 1067, 1123), and f.o.b. prices (Tr. 1038). From this he computed a net profit of \$1.63 per ton (Tr. 1059). He assumed total production, i.e.,

^{5/} The bulk of the production had been sold to the Navy in 1944 and 1945 for use on this Ordnance Testing Station (Tr. 388, 402, 415, 439-440, 984, 1006-1008).

^{6/} Government counsel moved the court unsuccessfully, on several occasions, to strike the opinions of each of these witnesses on the ground that their valuations were on an incorrect basis (Tr. 864-865, 1214, 1263, 1306-1307, 1360).

100,000 tons a year for the first five years and 130,000 a year after that (Tr. 1064, 1123). Since there was some question at the trial as to the duration of the lease on the Donna-Gill claims^{7/} he made two estimates of value on that group. On the basis of 10½ years of production, he valued that group at \$798,000, i.e., Donna at \$495,000 and Gill at \$303,000 (Tr. 1171-1172). On a 19-year life, he valued that group at \$1,108,000, i.e., Donna at \$687,000 and Gill at \$421,000 (Tr. 1172). To these figures he added his valuation of the Brown Group (for 35½ years) at \$251,000^{8/} (Tr. 1067, 1174-1175). Thus, his total values on those bases were \$1,049,000 and \$1,359,000, respectively. On a 14-years' operation for the Donna-Gill claims he found a total value of \$1,148,000^{9/} (Tr. 1062). He used a 10% compound interest discount rate, meaning a rate by which to reduce the projected future return to a present cash value (Tr. 1062-1064). He did not investigate sales of comparable mining claims (Tr. 1184).

^{7/} The court reserved its determination of ownership until after the valuation trial.

^{8/} White Gold \$108,000, Tired Boy \$90,000, Gray Boy \$25,000 and White Eagle No. 2 \$28,000 (Tr. 1176).

^{9/} On the Gill claim, assuming a lease with an option to purchase for \$10,000, he found a value of \$457,000 (Tr. 1337-1338). On the Donna claims, assuming a lease and purchase option of \$5,000, he found a value of \$757,000 (Tr. 1340).

Appellee's witness, Mr. King, found value by discounting future profits (straight discount) at 10% (Tr. 829, 837). He estimated the quantity of pumice, the selling price, and deducted mining and processing costs of labor, supplies, supervision, repairs, replacement, hauling, power and utility rental, compensation insurance, social security, welfare, taxes, licenses, office and travel and research (Tr. 830, 835, 840). He discounted "arbitrarily" 20% for capital investment (Tr. 837). He assumed total production at the rate of 55,700 tons per year and found a "net operating profit" of \$1.87 and \$2.12 per ton, respectively, on the two groups (Tr. 835, 839, 841-842, 916). On that basis, he valued the Brown Group (30-year life) at \$310,200 (Tr. 837-838).¹⁰ and the Donna-Gill claims at \$600,000--Donna at \$343,000 and Gill at \$277,000 (Tr. 850-851). He valued all the claims as operating as a unit, because absent monopoly control there would not be a sufficient market for total production (Tr. 850).

Appellee's witness, Mr. Schmidt, applied present value tables to his computations from estimated annual production of 118,000 tons, 10% interest on investment, 4% interest on a sinking

¹⁰/ He valued Tired Boy at \$157,900, White Gold at \$124,000 and White Eagle No. 2 at \$28,000 (Tr. 837-838).

fund and cost figures obtained from the Company's books (Tr. 1249-1250). He did not value the Brown Group. On the basis of nine years of production, he valued the Donna and Gill claims at \$700,000--Donna \$436,000, Gill \$264,000 (Tr. 1249-1252). If valued separately, the total was reduced to \$571,000--Donna \$420,000, Gill \$151,000--because of two overheads (Tr. 1259). If the Gill claim was under a five-year lease with an option to purchase it at \$10,000, he found a value for the lease of \$141,000 (Tr. 1275). In addition, the lessor's interest would be worth \$10,000 (Tr. 1311). If the Donna claim was under a lease with a royalty payment of 25 cents per ton, without a termination provision, he valued the lease at \$420,000 (Tr. 1275-1282). In that circumstance, the lessor's interest would be a capitalization of the royalty, or \$104,800, to be taken out of the \$420,000 (Tr. 1315-1316).

The Government's Valuations. Mr. Schuette, testifying as to the Brown Group, stated that underground pumice mining has not been profitable since 1943 (Tr. 1732). He said that these claims are worth nothing today--e.g., wages have increased from \$5 per day to \$25 per day (Tr. 1773). The claims might still have had a small speculative worth at the date of taking.

Accordingly, he assigned a value to them of \$1,100 (Tr. 1732).^{11/} He found no value in the Gill lease and option because "you could get a better bargain" (Tr. 1739-1740). As to the Donna-Gill claims, he testified that there was no record of profitable operations on them and that open-pit operations have never shown a profit out there (Tr. 1741). The business is highly competitive (Tr. 1742). He assigned a value to these claims of \$18,500--Donna \$11,000, Gill \$7,500 (Tr. 1739). Thus, his total valuation was \$19,600.

Mr. Jones examined sales of comparable claims in this area and in other areas about 130 miles distant (Tr. 1763-1766, 1783-1793). The court excluded consideration of the latter (Tr. 1793). As to the Brown Group, he believed that such remote, inaccessible, underground deposits were not competitive (Tr. 1797-1798). He valued them at \$1,200 (Tr. 1797).^{12/} He valued the Donna-Gill claims at \$20,000--\$10,000 each (Tr. 1799-1800). This was on the basis that there had never been a profit on them, but that some day, with new methods or market, there might be (Tr. 1800). His total valuation was \$21,200. He had no knowledge of any lease

^{11/} Tired Boy \$550, White Gold \$350, White Eagle No. 2 \$100, and Gray Boy \$100 (Tr. 1732).

^{12/} Tired Boy \$500, White Gold \$500, Gray Boy \$100 and White Eagle No. 2 \$100 (Tr. 1797).

on the Donna claim (Tr. 1800). He assigned a nominal (\$10 to \$100) value to the lease on the Gill claim as the value of the option (Tr. 1799). In his opinion, the 25 cents per ton royalty was high, there being others in the area at 10 cents per ton (Tr. 1799). He stated that the locator, Mr. Gill, believed that the option price of \$10,000 was reasonable (Tr. 1801).

The District Court's Award. The district court rejected the valuations of the Government's witnesses because of their brief inspections of the properties and because they "made no effort to make any calculations of the amount of pumice in place" (R. 387). It held that the Government's insistence on the use of comparable sales as the correct method to value these properties was misplaced and that, in any event, there were no comparable sales because it "is difficult to see how pumice claims can be comparable to one another unless adjacent or nearly so, as the quantity, quality, mining costs and access to market vary with each property" (R. 387-389). Disagreeing with an earlier decision in that district, United States v. Land in Dry Bed of Rosamond Lake, Cal., 143 F.Supp. 314 (S.D. Cal. 1956), it approved computing value by multiplying the quantity of pumice by the going unit price (R. 389). The court further held that "in mining

claims, as in oil and gas, a lease with the lessee paying a royalty to the owner, with or without an option to buy, is frequently, in fact almost always if mineral in any quantity is present, of much greater value than the undeveloped claim" (R. 386).

Considering the increasing competition with pumice of a new construction material ("expanded shale"), the court found that the life of the market for this pumice would have been five years (R. 395). The court said that it selected a value from appellee's witness, Schmidt, of 50 cents per ton in place (R. 395). Then, selecting an annual production for each claim, it made the following computations (R. 394-396):

<u>Claim</u>	<u>Production (Tons Per Year)</u>	<u>Total Production (Five Years)</u>	<u>Value at 50¢ Per Ton</u>
Donna Nos. 3 and 4	31,000	155,000	\$77,500
Ray Gill No. 31	19,000	95,000	47,500
Tired Boy	9,800	49,000	24,500
White Gold	8,100	40,500	20,250
White Eagle	2,000	10,000	5,000
Gray Boy	<u>3,000</u> 72,900	<u>15,000</u> 364,500	<u>7,500</u> 182,250

The court found that the American Pumice Company was obligated to pay a total royalty of \$5,000 to the locators of Donna Nos. 3 and 4, which was the value to the locators, so that the Company's value was reduced to \$72,500. Since no one claimed that \$5,000, it was not awarded. Similarly, as to Ray Gill Nos. 31, the court found the total value to the locator to be \$10,000, minus any royalties received, so that the Company's value was reduced to \$37,500. Since the locator waived his interest, the \$10,000 was not awarded. As a result, the court entered judgment awarding \$167,200 to the American Pumice Company as just compensation for the taking (R. 449). This appeal followed.

SPECIFICATION OF ERRORS

1. The district court erred in valuing the pumice deposits from the assumed net profit of a hypothetical pumice mining, processing and selling business.
2. The district court erred in multiplying a computed net profit per ton by the number of tons estimated to be produced in five years and returning the resultant figure directly as the condemnation award.
3. The district court erred in refusing consideration of all comparable sales.

4. The district court erred in assuming large annual sales of pumice from each of the deposits concurrently.

5. The district court erred in not regarding the sales prices of some of these very pumice claims, near the dates of taking, as bearing on the value of appellee's property interests.

6. The district court erred in compensating the appellee for loss of business profits rather than for the value of the property taken.

7. The district court erred in relying on opinion testimony without any support in the demonstration and physical facts.

8. The district court erred in basing the award on conjecture, speculation and unwarranted assumptions.

9. The district court erred in accepting the witness Schmidt's per-ton valuation and in applying it to a different duration and amount of production.

10. The district court erred in relying on a computation from earnings of a business venture, using an interest (risk) rate without any showing of support for it in comparable investments.

11. The district court erred in mathematically calculating value.

12. The district court erred in not reducing assumed earnings for the future to their worth at the date of valuation.

ARGUMENT

THE DISTRICT COURT ERRED IN REJECTING THE EXISTING MARKET PRICE OF PUMICE DEPOSITS AND VALUING A HYPOTHETICAL BUSINESS VENTURE

A. The court erroneously refused to consider any comparable sales. - The courts have repeatedly held that where sales of the same or comparable property exist, they should be considered as the best indication of market price and that "resort * * * to other data to ascertain its value" is clearly a secondary and conjectural approach. E.g., United States v. Miller, 317 U.S. 369, 374-375 (1943); Olson v. United States, 292 U.S. 246, 257 (1934); Montana Railway Co. v. Warren, 137 U.S. 348, 352 (1890); United States v. Sowards, 370 F.2d 87, 89 (C.A. 10, 1966); United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964). As the court said in Baetjer v. United States, 143 F.2d 391, 397 (C.A. 1, 1944), cert. den., 323 U.S. 772:

In fact, in the absence of recent transactions of a like nature involving the land itself, they are the best evidence of market value. What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available. In the absence of such evidence a determination of value becomes at best only a guess by informed persons.

Real property may be unique and the comparable sales too few to establish a conclusive market price, "But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property." United States v. Toronto Nav. Co., 338 U.S. 396, 402 (1949); United States v. Whitehurst, supra.

The Government sought to offer evidence of the sales prices of pumice claims in the same county as some of these claims (about 130 miles away) and in the next county to the north (Tr. 1783-1794). The court sustained objection to these and in its opinion said (R. 388): "It is difficult to see how pumice claims can be comparable to one another unless adjacent or nearly so, as the quantity, quality, mining costs and access to markets vary with each property." But those factors go to the weight of the evidence and could have been fully developed

by appellee on cross-examination. This absolute exclusion of other than nearly adjacent properties was unduly restrictive under the foregoing authorities and under United States v. Lowrie, 246 F.2d 472 (C.A. 4, 1957). Certainly, those sales prices, with any necessary adjustments, would have had a closer bearing on market value than the structure of assumptions on which the court relied.

In addition, the court gave no consideration to the fact that some of the very mining claims involved had been sold, both before and after the date of taking, for relatively small amounts. The reason given by the court for not considering these sales was that "in mining claims, as in oil and gas, a lease with the lessee paying a royalty to the owner, with or without an option to buy, is frequently, in fact almost always if mineral in any quantity is present, of much greater value than the undeveloped claim" (R. 386).

But regardless of whether that factual assumption is supportable, that position is not apposite to the circumstances and sales involved here. Gray Boy and White Eagle No. 2 were undeveloped. Donna Nos. 3 and 4 were developed and had been operated by this very Company, yet in 1946, Mr. Wicks sold them to Mr. Splane for \$5,000 (Tr. 493). Both men were

experienced in the mining industry. Previously, appellee had succeeded by assignment to a lease and option to purchase these Donna claims (plus others) for \$5,000 pursuant to an agreement executed in 1942 (Tr. 1363-1366). In 1943, Mr. Gill executed a lease for Ray Gill No. 31 to American Pumice Company with an option to purchase for \$10,000 and in 1946 Mr. Gill sold that claim which had been operated by this very Company to Mr. Splane for \$15,000^{13/} (Tr. 1385, 1387).

It is noteworthy that Mr. Splane incurred liabilities of \$180,000 trying to operate the Donna-Gill group in 1946 and 1947 (Tr. 1813, 1829, 1839-1840). This circumstance bears on the district court's reference to the fact that in 1947 Mr. Newby (partner in Desert Materials Company and President of Crownite) paid \$15,000 to Gill and \$5,000 to Wicks (the locators of the Donna-Gill group) and \$250,000 to Splane (and his creditors) who held the lease and option (R. 387). The court used this to show that "a lease with the lessee paying a royalty to the owner * * * is of much greater value than the undeveloped claim" (R. 386-387). But that purchase price was \$170,000 more than Mr. Newby intended to pay because the purchase agreement with Splane included assumption of Splane's liabilities which were

13/ This price included four additional claims (Tr. 1387).

\$150,000 more than Splane had represented (Tr. 1839-1840), and because Newby had not known that anything was owing to the locators (Tr. 1814). The remaining amount covered eight locations in addition to Donna Nos. 3 and 4 and Ray Gill No. 31 (Tr. 1830) and all of Splane's personal property and equipment as well as his business in Los Angeles and provided funds "to purchase additional equipment and as additional working capital of said business" (Def. Ex. CP; R. 383, fn. 1). In short, it was a sale of Splane's pumice mining and selling business to Newby, with Splane remaining as "head of the sales department" (Def. Ex. CP). So, again in this reference, the court looked to the price of a business to support its valuation of an interest in real property.

The court referred to a report by appellee's witness, Mr. Schmidt, made to the Navy on November 18, 1946, when he was employed by the Government, which stated that the value of the Ray Gill No. 31 claim was \$8,000 because it contained \$500,000 worth of pumice (R. 387; Tr. 1350; Pl. Ex. 13). This was used again to support the view that a lease is worth more than "an undeveloped claim." But this was not an undeveloped claim. It had been worked by the American Pumice Company. The mere

placing of an operating company on or off the property cannot affect the value of a known deposit. The presence of \$500,000 worth of pumice is not, contrary to the court's apparent belief, an additional factor to be added to the market value which Schmidt expressed based on that amount and value of pumice in the ground. It was obviously Schmidt's judgment, at that time, that operating companies were paying about \$8,000 for such a deposit, having in mind the vagaries of the market and of costs. Certainly, operating companies were not paying each other more merely because an operating company was on the property by lease. There was nothing that the presence of an operating company or the existence of a lease could have added to the value of this known and developed deposit. There was no evidence that anyone ever paid the net profit per ton testified to by appellee's witnesses and used directly as their valuations.

So again in this respect, we submit, the court has led itself away from what pumice deposits actually sell for in the market--by being concerned with computed possibilities of earnings of a pumice producer. This overlooks the fact that the prices actually paid in the market already have taken those possibilities into account. The market price reflects

the actualities as conceived by both owners and producers. There is no occasion for a condemnation valuation court to construct a market price which it thinks ought to exist or which it believes can be supported by certain facts and assumptions. The dealers in pumice deposits in the market place have not reached that result. And, as will be shown, it is their valuation which must govern in a condemnation proceeding.

B. The facts here show the fallacy of the court's method of valuation. - In this case the Government acquired a property interest--^{14/}mining claims--but it is paying for the net profits of an assumed profitable business venture. Appellee's witnesses and the court did not consider the actual sales prices of working or workable pumice mining claims. Instead, they constructed from assumptions a hypothetical business venture on these properties, computed its assumed profit, and returned that as the value of the property interest. The circumstances here clearly show the fallacy of that method of valuation and why courts have rejected it.

^{14/} It has been assumed that these were valid mining claims. However, the evidence suggests the question whether the facts were sufficient to demonstrate an existing valid discovery at the date these lands were devoted to naval uses.

In the first place, as to production, appellee's witnesses and the court have assumed large annual sales of pumice from each of these claims concurrently. The court assumed total sales of 72,900 tons per year (R. 394-396). Nothing approaching that tonnage had ever been sold from these properties before. No pumice had ever been produced from Gray Boy or White Eagle No. 2. Production from White Gold had only been "periodic" (Tr. 112). There had been no production by appellee from Ray Gill No. 31 after August 23, 1943 (Tr. 1376-1377). The actual yearly production from all the claims involved here, excluding sales to the Navy, for the years 1941 through 1944 was 1,661 tons, 1,591 tons, 1,569 tons and 9,710 tons (Tr. 1005-1006). The total production of pumice in the entire State of California (including sales to the Navy) for the five years following the taking here was 83,900 tons in 1945, 116,650 in 1946, 152,900 in 1947, 178,300 in 1948, and 135,700 in 1949 (Tr. 1002, 1125-1128). Appellee's own witnesses acknowledged that these claims could not economically all compete with each other at the same time for the available market (Tr. 410, 863, 907). And, with respect to the Brown Group, the unrebutted evidence is that there have been no underground pumice mining operations in California since 1943 because that type of operation is too costly (Tr. 1732, 1797).

In the second place, as to the assumed "net profit," it was never shown that these claims had ever been profitably operated before the taking--even with substantial sales to the Navy ^{15/} (Tr. 388, 415, 439-440, 984, 1006-1008, 1125, 1151). The Company had operated at a loss of 50 cents per ton in 1944 and 1945 (Tr. 1169). The Government was not permitted to show whether the Donna-Gill group (the principal producers) had been profitably mined for the 17 years following their exclusion from the Project, when they were being worked by Desert Materials Company and then by Crownite Corporation, on the ground that such evidence involved too many uncertain factors or, in the court's words, "There are too many things that enter into it," including competence of the management, bookkeeping methods, general overhead, interest on bank loans, salaries, etc. (Tr. 1824-1826). But the court permitted appellee's witnesses to construct a hypothetical business venture based on estimates of precisely those factors and the many others involved in such a venture and to compute from

^{15/} In ascertaining the demand or market for this material, the requirements of the Government for the project for which the property is taken must be totally excluded from consideration. United States v. Miller, 317 U.S. 369 (1943); United States v. Cors, 337 U.S. 325 (1948); United States v. Whitehurst, 337 F.2d 765, 772 (C.A. 4, 1964).

the assumed success of that business a sum of money which they returned directly as the value of the property interests involved here. And this was the method followed by the court. We submit that use of such a wholly conjectural method of valuation was erroneous, particularly where there were several sales of the very property interests involved near the dates of taking. Otherwise "that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value--a thing to be condemned in business transactions as well as in the judicial ascertainment of truth." Olson v. United States, 292 U.S. 246, 257 (1934).

C. The law prohibits the court's method of valuation. - Over the years, the courts have developed working rules for condemnation valuation proceedings. In general, these rules have had as their purpose the assurance (1) that the valuation is for what was actually taken and (2) that the valuation has realistic ties to the market place. The need for those rules is illustrated by this case.

Thus, the valuation here was directly based on the earnings ("net profit") of a hypothetical pumice mining and selling business. But that is not what the Government took. Loss or frustration of business profits is not compensable.

Bothwell v. United States, 254 U.S. 231 (1920); Joslin Co. v. Providence, 262 U.S. 668 (1923); Mitchell v. United States, 267 U.S. 341 (1925); United States v. Petty Motor Co., 327 U.S. 372 (1946).

The alleged profitableness of the business was contrary to the evidence of past experience and was premised on instantly commencing sales from all the deposits of quantities which had never been sold before and which all witnesses agreed could not simultaneously be sold at a profit. "Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts on which it is based." State of Washington v. United States, 214 F.2d 33, 43 (C.A. 9, 1954), cert. den., 348 U.S. 862. "* * * an opinion is no better than the hypothesis or the assumption upon which it is based." International Paper Company v. United States, 227 F.2d 201, 205 (C.A. 5, 1956). "Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings." United States v. Honolulu Plantation Co., 182 F.2d 172, 178 (C.A. 9, 1950), cert. den., 340 U.S. 820; Atlantic Coast Line R. Co. v. United States, 132 F.2d 959, 963 (C.A. 5, 1943).

In United States v. Whitehurst, 337 F.2d 765, 772 (C.A. 4, 1964), and United States v. Chase, 260 F.2d 405 (C.A. 2, 1958), the courts rejected similar, computed, hypothetical values for sand and gravel as "unrealistic, speculative and lacking the necessary factual support" and for want of "any basis in fact." In United States v. Sowards, 370 F.2d 87, 92 (C.A. 10, 1966), the court, rejecting a computed value for a coal deposit, said that an "opinion or estimate [of value] must be founded on substantial data, not mere conjecture, speculation or unwarranted assumption." This Court has recently rejected a condemnation valuation based on capitalization of earnings for those same reasons in Public Utility Dist. No. 1 of Pend Oreille Co. v. City of Seattle, 382 F.2d 666, 674 (1967).

The court accepted Mr. Schmidt's value of the pumice^{16/} "which amounts to approximately 50 cents per ton in place" and found "that the life of such market would be five years" (R. 394). But Mr. Schmidt did not find a value of 50 cents per ton, or any other per ton value, for all purposes and circumstances. It was a computed figure that took into

^{16/} We have not been able to reach this per ton value from Mr. Schmidt's figures. He did not even value the Brown Group of claims (underground) to which the court applied this figure.

account 10% interest on investment, return of investment, 4% interest on a sinking fund and present value tables (Tr. 1249-1250, 1315-1316). Hence, the figure would vary with the number of years of estimated operation. Schmidt estimated nine years (Tr. 1249-1252). Moreover, Schmidt's value was directly related to his estimated quantity of production which the court did not use (Tr. 1351-1353). Therefore, the court's application of "Schmidt's opinion as the most reasonable one on this point" to a five-year operation and a different quantity of production was not use of Schmidt's figure at all.

Moreover, neither Schmidt nor any witness for the appellee supplied any indication that the interest (risk) rate which they selected in their computations had any support in comparable investments. As the court said in United States v. Whitehurst, 337 F.2d 765, 772-773 (C.A. 4, 1964), reversing a valuation of a sand and gravel pit:

The capitalization or interest rate selected and applied in the formula used here reflects the degree of risk in the undertaking involved. It is an extremely important figure in the computation because a change of even a fraction of one per cent

will produce a surprisingly material change in the result. In *United States v. 158.76 Acres of Land, etc.*, 298 F.2d 559 (2 Cir. 1962), involving deposits of gravel, the court rejected a valuation based on the capitalization of income theory like the one used here and stated at page 561:

"* * * Capitalization of income comprehends the use of a rate of return in comparable investments. See *United States v. Leavell & Ponder, Inc.*, 5 Cir., 286 F.2d 398, 407, cert. den. 366 U.S. 944, 81 S.Ct. 1674, 6 L.Ed.2d 855 * * *. There was no testimony whatever about comparable investments. Mr. Chatterton merely used a formula from a handbook of factors for present value of an annuity of \$1.00 per year. Nor was there testimony by any witness that a commercial market for gravel would persist for 40 or 60 years."

In the cited *Leavell & Ponder, Inc.*, case, 286 F.2d 398 (5 Cir. 1961), Chief Judge Tuttle wrote at page 407:

"* * * For one to give an opinion on value he is ordinarily required to base such opinion on knowledge of sales at arm's length and without compulsion of comparable properties or on knowledge of the rate of return which the ordinary prudent investor requires in order to invest in a comparable project when he has complete freedom of choice."

* * * * *

"* * * Clearly 'capitalization of income' comprehends the use of a rate of return in comparable investments.

Evidence of rate of return that is in no way related to a comparable investment does not meet this requirement.

"The absence of any conclusion of value supported by competent evidence in the record requires that the judgment of the trial court be set aside."

The district court, in its opinion, cited a series of decisions in support of its valuation method. The thrust of those decisions, according to the court, is approval of multiplication of quantity of material in the ground by unit price. We agree that the estimated quantity of material and the unit price are matters, among others, to which the expert may properly give consideration and his opinion may not be excluded because he did so. But it is a far different thing and we know of no decision that authorizes use of the product resulting from multiplication of the two as the direct conclusion as to the value of the entire deposit. Such a method is simply contrary to human experience. "No man of business experience would buy property on that theory of value." United States v. Indian Creek Marble Co., 40 F.Supp. 811, 822 (E.D. Tenn. 1941); United States v. Sowards, 370 F.2d 87, 91 (C.A. 10, 1966).

For that reason, it has been repeatedly held that "in condemnation cases valuation is not a matter of mere mathematical calculation but involves the exercise of judgment." United States v. Whitehurst, 337 F.2d 765 (C.A. 4, 1964); Parkbelt Homes v.

United States, 171 F.2d 230 (C.A. 4, 1948); United States v. Toronto Nav. Co., 338 U.S. 396, 401-402 (1949); Standard Oil Co. v. So. Pacific Co., 268 U.S. 146, 156 (1925); United States v. Brooklyn Union Gas Co., 168 F.2d 391, 398 (C.A. 2, 1948).

We agree with the earlier decision in this district by Judge Carter in United States v. Land in Dry Bed of Rosamond Lake, Cal., 143 F.Supp. 314, 322 (S.D. Cal. 1956), that "In other words, a clear distinction must be drawn between what is presented and considered as a factor underlying the expert's opinion as contrasted with opinion as to the fair market value of the substance, timber or mineral itself, apart from the land." That decision further stated (p. 315):

Quantity and Quality of rock, mineral or timber in place and the per ton or unit value thereof cannot be multiplied out to give market value; nor may it be valued separate from the land.

"* * * The separate valuation of timber or rock attached to land, or valuations arrived at by a process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation. United States [ex rel. Tennessee Valley Authority] v. Indian Creek Marble Co. D.C. 40 F.Supp. 811. * * *" United States v. 13.40

Acres, D.C. Cal. 1944, 56 F.Supp. 535, at page 538. From the facts of that case, the experts for the landowner did exactly the thing shown in the quote, namely multiplied the yards by a given price and arrived at a valuation. The court properly granted a motion for a new trial.

The reason why that figure cannot realistically be returned as the market value, even when adjustments are sought to be made, was stated in Georgia Kaolin Co. v. United States, 214 F.2d 284, 286 (C.A. 5, 1954), cert. den., 348 U.S. 914:

In rejecting the method of multiplying the estimated amount of clay by a fixed price per unit, the conclusion is largely based on its speculativeness. In discussing this point, the court below said that whether or not the deposits would be mined and the royalties paid would depend upon the condition of the market, the uncertainty of the future, the demand for the product, "and many other elements, on and on, in the future."

See also Mills v. United States, 363 F.2d 78 (C.A. 8, 1956); United States v. 158.76 Acres in Townshend, Vermont, 298 F.2d 559, 561 (C.A. 2, 1963); United States v. Glanat Realty Corp., 276 F.2d 264, 265 (C.A. 2, 1960); United States v. Rayno, 136 F.2d 376, 380 (C.A. 1, 1943), cert. den., 320 U.S. 776. Compare Olson v. United States, 292 U.S. 246, 257 (1934); United States v. Cunningham, 246 F.2d 330, 333 (C.A. 4, 1957); United

States v. Meyer, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den., 311 U.S. 706; Morton Butler Timber Co. v. United States, 91 F.2d 884, 887-888 (C.A. 6, 1937).

In United States v. Sowards, 370 F.2d 87, 91 (C.A. 10, 1966), the court quoted with approval the following expression in United States v. Indian Creek Marble Co., 40 F.Supp. 811, 822 (E.D. Tenn. 1941):

True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted.

For all the foregoing reasons, we submit that the district court, in its unique result, has stepped outside the limits of the established working rules in condemnation valuation proceedings and, in so doing, has committed reversible error.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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APRIL 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

S. Billingsley Hill
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APPENDIX

TABLE OF EXHIBITS

<u>PLAINTIFF'S EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
2 to 5, incl.		Tr. 601
6, 7		Tr. 602
8	Tr. 688	
9	Tr. 1132	Tr. 1083
9A	Tr. 1780	Tr. 1883
10	Tr. 1189	Tr. 1388
11	Tr. 1286	
12	Tr. 1292	Tr. 1295
13	Tr. 1319	Tr. 1334
14	Tr. 1360	Tr. 1372
15	Tr. 1360	Tr. 1375, 1884
16	Tr. 1360	
17		Tr. 1388
18		Tr. 1687
19	Tr. 1683	Tr. 1687
20	Tr. 1693	Tr. 1694
21	Tr. 1709	Tr. 1745
21A-1 to 21A-11, incl.	Tr. 1709	Tr. 1715
22	Tr. 1709	Tr. 1745
22A-1 to 22A-4, incl.	Tr. 1709	Tr. 1745
23	Tr. 1721	Tr. 1724
24	Tr. 1724	Tr. 1745
25	Tr. 1757	Tr. 1758

<u>DEFENDANT'S</u> <u>EXHIBITS</u>	<u>FOR</u> <u>IDENTIFICATION</u>	<u>IN</u> <u>EVIDENCE</u>
A to AA, incl. ^{*/}	Tr. 14	Tr. 261, 264, 26 320, 339, 632
A		Tr. 21
B to J, incl.		Tr. 1880
L		Tr. 1878
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BO	Tr. 168	Tr. 175
BP	Tr. 168	
BQ	Tr. 168	Tr. 177

*/ Exhibit T withdrawn (Tr. 266).

DEFENDANT'S
EXHIBITS

FOR
IDENTIFICATION

IN
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BV	Tr. 168	Tr. 181
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CT	Tr. 1791	Tr. 1882
Y-1	Tr. 334	
Y-2	Tr. 368	Tr. 372

<u>DEFENDANT'S EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
Z		Tr. 578
Z-1	Tr. 581	Tr. 581
311A to 311D, incl.	Tr. 615	
3472A	Tr. 615	Tr. 641, 1844
3472B	Tr. 615	
3472B-1	Tr. 646	Tr. 660
3472B-2 to 3472B-7, incl.	Tr. 661	Tr. 664
3472B-8 to 3472B-10, incl.	Tr. 666	Tr. 669
3472B-11	Tr. 716	Tr. 717
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3472D	Tr. 615	
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3472D-2 to 3472D-3, incl.	Tr. 713	Tr. 714
3472E	Tr. 615	
3472E-1	Tr. 685	Tr. 699
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3472F-4	Tr. 750	Tr. 752
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3472F-7	Tr. 757	Tr. 761
3472F-8	Tr. 805	Tr. 809
311A		Tr. 766
311B		Tr. 818

DEFENDANT'S
EXHIBITS

FOR
IDENTIFICATION

IN
EVIDENCE

311C		Tr. 815
311A-1	Tr. 766	Tr. 952
311A-2	Tr. 952	Tr. 957
311A-3	Tr. 952	Tr. 957
311A-4 to 311A-9, incl.	Tr. 958	Tr. 972
311A-10	Tr. 1237	Tr. 1239
311A-11	Tr. 1237	Tr. 1240
311A-12	Tr. 1237	Tr. 1243
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311B-1	Tr. 972	Tr. 985
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IN THE

JUL 12 1968

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN PUMICE COMPANY,

Appellee.

Appeal From the United States District Court for the
Central District of California.

APPELLEE'S BRIEF.

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FILED

JUL 12 1968

WM. B. LUCK CLERK



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No. 22,290

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN PUMICE COMPANY,

Appellee.

Appeal From the United States District Court for the
Central District of California.

APPELLEE'S BRIEF.

Statement.

The issue on appeal relates to the value of two groups of pumice mines. Fee title to the real property always was and remains in the United States. The only interest being condemned was the right to possess and mine the claims. Just compensation would be measured by the combined value of the locator's rights, or of their successors, and of the lessees' interest under the leases and options. The one group known as the Donna-Gill claims is approximately 50 miles from the other group known as the Brown Group claims. The first-named group were operated as open pit mines, whereas

the second-named group were worked mainly as underground operations. Portable equipment was used to conveniently produce from mines in each group. The time of production was based in part on demand for a particular type of pumice and in part on the weather. Both open pit and underground mining was simple and economic [Tr. 142; Def. Exs. BA. and BB.].

Appellee's Contention.

1. There were no sales of comparable properties.
2. Where there are no comparable sales, the District Court quite properly considered a second recognized approach to valuation, namely the capitalization of income approach.
3. Appellant's valuation testimony had no probative value, the District Court's findings on value are well within the valuations testified to by Appellee's witnesses and the judgment should be affirmed.

ARGUMENT.

1. The Valuation Problem Before the District Court Was to Determine the Fair Market Value of the Right to Extract Pumice From Certain Unpatented Mining Claims.

The value would of necessity be determined from what an informed prospective, willing buyer would pay an informed prospective, willing seller of these rights. The claims were in wild, barren desert used for a missile range, and not suitable for any surface, private users, nor legally available for any such uses. A sale of such rights in order to be comparable and capable of shedding some light on the value of the rights under consideration herein, would necessarily need to be within an area which is not too far distant from the principal market for such pumice as to make it competitive with subject properties. Appellee's witness Frederick testified that the subject claims were of special pumice character and rare; that pumice deposits in a different district and the price of sale of them would have no bearing on a comparison with subject properties [Tr. 1184]. He further testified that the transactions (after the American Pumice Company was excluded) between Splane and others were of no value and were not open market comparable sales of clear title to any of the claims [Tr. 1185-1193].

Appellee's witness King testified that the subject claims had an advantage (a freight umbrella) as competition is involved with another 100 miles or more of hauling and to far away to compete; that there are no comparable mining claims [Tr. 867-871].

In this respect, Appellant's witness Schuette on cross-examination admitted that hauling costs from pumice mines in Mono County which he investigated were considerably more per ton mile to the Los Angeles area market [Tr. 1746].

Appellant's first witness Schuette "browsed" around the Brown group of subject claims one day and around the Donna-Gill claims one day also [Tr. 1748-1754]. He offered no testimony as to comparable sales.

Appellant's witness Jones testified that the Mono County mines he investigated had no aggregate or accoustical pumice—only block pumice—and that costs to haul from the Bishop-Laws area pumice deposits he investigated, would be 40 to 50 cents per ton mile more for the additional 130 miles; and railroad would be considerably more. He was uninformed as to the necessary drying cost in Bishop-Laws area [Tr. 1864-1865].

Jones discussed in vague terms a sale in Sonoma County in 1938, "about 35 miles north of Bishop, I guess," [Tr. 1764]. No other details of the purported sale were offered. The same witness testified to discussions with persons who had bought and sold pumice claims in Sonoma County but did not testify to details thereof. No specific sales were offered [Tr. 1765]. He also testified to discussions with a party who had sold some unspecified pumice claims back in 1926. No specific transactions were described [Tr. 1765]. Over and above this, the location and existence of the so-called comparable sales was not shown. He could not

determine from the location notices either the County or the Township or Section where such properties were located [Tr. 1787-1793]. There was a total absence of any testimony as to quantity or quality of pumice on the locations mentioned.

Jones further testified that he discussed a sale of two mill sites, some personal property, and the invalid Donna No. 5 claim. This obviously did not qualify as a comparable sale, so no further testimony was permitted over objection on the subject by the District Court [Tr. 1765-1771]. This witness finally testified that he searched for comparable sales in the subject area but “couldn’t find anybody that knew anything about them and couldn’t find out any facts.” [Tr. 1794-1795].

Thus, from the testimony of Appellant’s witnesses, there appeared and it was established that there were no comparable sales.

There was no valid testimony of comparable sales presented to the District Court during the trial. Appellant argues (pp. 15, 16 of Brief) that these inadequacies in the foundational establishment of the alleged sales were merely factors going to the weight of the evidence and could have been fully developed by Appellee on cross-examination. The fact that any sale took place, was not shown to the court; and in any event Appellee cannot be called upon to supply deficiencies in meeting foundational requirements which are the responsibility of Appellant’s witnesses.

2. There Are Three Recognized Approaches to the Valuation of Real Property or Interests in Real Property.

There are three recognized approaches to the valuation of real property or interests in real property, namely;

(a) The market data or comparable sales approach;

(b) The summation approach, *i.e.* replacement cost new of improvements, less depreciation, plus the value of the unimproved land as indicated by comparable sales of vacant land; and

(c) The income or capitalization approach.

United States v. Sowards, (C.A. 10, 1966) 370 F. 2d 87.

It generally is believed that current sales at arms' length of similar property are the best evidence of market value. Sometimes there is a clear market, as in the case of sub-division lots being offered and sold at a fixed price. In other cases, however, there may be no market that can be shown either by recent prior sales of the property taken, or comparable property in the vicinity upon which value may be predicated. In such cases, it is necessary to resort to other data to estimate its value including, where appropriate, the capitalization of estimated future income or reproduction cost less depreciation. *United States v. Toronto Nav. Co.*, (1949) 338 U.S. 396, 402; *Kimball Laundry Co. v. United States*, (1949) 388 U.S. 1; *Kinter v. United States*, 156 F. 2d 517 (C.A. 3, 1946); *United States v. General Motors*, (1945) 323 U.S. 373; *United States v. Petty Motor Co.*, (1946) 327 U.S. 372; and *United*

States v. Causby, (1946) 328 U.S. 256. In *United States v. Sowards*, (C.A. 10, 1966) 370 F. 2d 87, the court took the position that determination of market value is not limited to evidence of sales of comparable properties a reasonable time before taking. The Court stated:

“Recognizing difficulties of establishing market value where there are no comparable sales, the Supreme Court in *U.S. vs. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 LEd. 336, at 374 and 375 stated:

‘Where for any reason the property has no market resort must be had to other data to ascertain its value— .Where the property taken, and that in its vicinity has not in fact been sold within recent times, or in significant amounts, the application of the concept involves at best, a guess by informed persons.’

as we stated in *Sill Corp. vs. U.S.* 10 Cir., 343 Fed. 2d, 411, 416, cert. denied 382 U.S. 840, 86 S.Ct. 88, 15 L.Ed. 2d 81:

‘We know of course, that the law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation. See: *U.S. vs. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 LEd. 336, and *U.S. vs. Sowards*, et al. (C.A. 10) 339 Fed. 2d 401. It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants.’ ”

In the instant case, inasmuch as there were no comparable sales, this approach was not useable. The summation approach is only adapted to improved real prop-

erty, therefore this method was not useable as the claims are unimproved.

The income or capitalization approach is particularly adaptable to the valuation of the pumice claims in this case by reason of the common-sense fact that buyers of such claims, or of leases to mine and sell the ore bodies therein, would be motivated solely by the prospective net income which would result from their mining operations. This value, common practice in the mining community shows, is determined by a consideration and processing of the various elements that relate to such mining operations.

Appellee's witness King testified that the theory he used to appraise these mining properties is used all over the world [Tr. 829, 909, 919]. Frederick testified for Appellee that in an evaluation of pumice in the ground, the only way to calculate a value of it is to determine what it might sell for, when you would sell it, and the rate at which you would sell it [Tr. 1153]. He further testified that it is common and recognized practice to use a 10% discount factor and the Markell formula (a straight discount method) to evaluate long life mines [Tr. 1195-1202]. Appellee's witness Schmidt testified to the capitalization method for evaluating mineral deposits. One which he devised¹, was referred to in a leading mining text book. See *Mine Examination & Valuation*, Baxter & Parks, 2d Edition, 1933, 1939. He used a 10% discount factor [Tr. 1249].

The indicated present value of the claims, *i.e.*, the present worth of the right to extract and sell the

¹The Present Value of a Mine.

mineral, must be the result of intelligent consideration of these things:

(1) What is the quality and the quantity of the recoverable ore deposits?

(2) What would be required as a capital investment, to undertake mining—roads, plant, physical requirements?

(3) What would be the total cost per ton or per unit of product to extract the same and transport it to the point of delivery?

(4) What would be the gross selling price per ton F.O.B. point of delivery?

(5) What would be the amount in tons that could be expected to be produced and sold per year and for what period of time (useable economic life of claim)?

(6) What would the practice and custom in the industry require as a return; or, in other words, what capitalization or discount rate should be applied to the indicated net income stream to reduce it to the indicated present value of the future benefits?

As to each of the subject claims, all of the above considerations and elements were carefully determined, considered and processed by each of Appellee's witnesses, Frederick, King, and Schmidt.

Appellant's brief is laced with the misconception that the Appellee's witnesses and Judge Hall were hypothesizing a pumice mining processing, delivering and selling business, and with the further misconception that value was determined by the Judge by mathematically computing it by multiplying the quantity of pumice in the

ground by the going unit price. These misconceptions show up throughout the thirty one pages of its brief. Indeed, on Page 2, under the heading, "Questions Presented," Appellant asserts Question No. 1 to be: "Whether in this condemnation valuation case there is support in the facts or in the law for the District Court's award arrived at 'by constructing a hypothetical pumice, mining, processing and selling business, etc.'" Strangely another place in Appellant's Brief (p. 18) (in referring to Ray-Gill No. 31), it asserts: "But this was not an undeveloped claim. It had been worked by the American Pumice Company." Again, (at p. 19) the same claim is referred to by Appellant as a "known and developed deposit."

There is nothing hypothetical in the un rebutted fact that long before the date of taking, the subject properties were in operation, and were month in and month out, year in and year out, mining, processing, delivering to railroad pick-up sidings, and there disposing of by sale pumice of the several kinds produced from both the Brown Group of claims and the Donna-Gill Group of claims. Oral testimony and exhibits show the active mining processing and shipping methods in vogue at the date of value in these cases. Loading chutes, a sacking and bagging plant, drag line operation, stockpiles of pumice, equipment at rail siding, loadingcar methods were testified to by Appellee's witness Splane and illustrated in exhibits [Tr. 152, 160, 175, 176, 178 and 179; Def. Exs. AU, AV, AW, AY, BA, BB, BK, BL, BM, BN, BO, BQ, BS, BT and BY].

Appellee's witness Splane testified that pumice had been produced from Donna-Gill and Brown Groups claims from 1940 until the Navy took possession in

1944 and 1945 [Tr. 138-141]; that it was sold to U.S. Gypsum Company, Gladding McBean, and other manufacturers of accoustical plaster as well as for large buildings in the Los Angeles Metropolitan market, as far north as Salinas, south to San Diego and to Imperial Valley [Tr. 138-141]. He testified that 90% of light weight aggregate users in Southern California were being supplied by American Pumice Company; that 18 prominent buildings, including General Petroleum and Saks' 5th Avenue, in Los Angeles, were constructed using the pumice from these mines [Tr. 141]. Pumice was sold to important contractors such as Simpson Construction Co. and P. J. Walker in Los Angeles [Tr. 169]. The ceiling in the District Court room was made from accoustical pumice granules from the Brown Group of claims [Tr. 912]. He testified that there was still an active and going market for the pumice from subject claims in 1946, 1947, 1948 and still going on in 1964 [Tr. 175].

The evidence showed by the testimony of Appellee's witnesses Frederick and King that there was a substantial market for pumice within reasonable hauling distance long before and on the date of value and that aside from a let-down during the war years (which affected all building material industries) the demand renewed itself after the war, and prospect of growing demand was fairly indicated [Tr. 862-3]. The peak of the market in California was from March 20, 1945, to September 24, 1956 [Tr. 862-3].

Pumice production in California increased 50% in 1944 from 1943. It increased 100% in 1945, to 48,000 tons, to 81,000 tons in 1946, to 154,000 tons in 1947.

to 177,000 tons in 1948, and then up to 239,000 tons in 1951 [Tr. 1001-1003].

Appellee's witness King obtained from official State sources the selling prices of pumice products [Tr. 931] as well as from his own investigation and knowledge of market conditions [Tr. 831-835]. This witness had determined the cost of production of the various grades of pumice from both the Donna-Gill and Brown Groups of claims [Tr. 830-839].

Appellee's witness Frederick investigated the actual selling price of pumice in California from 1936 to 1964 and in addition the selling prices of pumice from subject properties specifically from 1941 to 1963 [Tr. 993, 1036, 1038, 1040, 1051].

Appellee's witness Schmidt in forming his value opinion of Donna 3 and 4 and Ray Gill No. 31, uses actual cost figures from the company books, and actual published sales prices [Tr. 1249].

From a consideration of all of the factual data, namely; quantity of pumice in the mines, rate of production in California and in the subject area, cost of its production, processing and delivery to point of sale, sales prices of pumice at point of delivery and each of Appellee's witnesses formed and expressed their opinion of the value of each of the pumice claims. These were not arbitrary figures, but considered opinions from highly experienced mining engineers and geologists as to what a willing buyer and seller would be likely to pay on the open market for such claims at the date of value [Tr. 829, 909, 919, 1153, 1179].

Appellant contends that another District Court decision *United States v. Land In Dry Bed of Rosamond*

Lake, Calif., 143 F. Supp. 314, 322 (S.D. Cal. 1956) is controlling and relies on it strongly. Judge Carter's opinion is in disagreement with the Courts of Appeal in the Third, Fourth, Eighth and Tenth Circuits, as well as the District of Columbia. These cases are:

National Brick Company v. U.S., (D.C. 1942)
131 F. 2d 30 (involving sand);

Clark v. U.S., (CA. 8, 1946) 155 F. 2d 157 (involving lumber);

Cade v. U.S., (CA. 4, 1954) 213 F. 2d 138 (involving granite);

United States v. Silver Queen Mining Company,
(CA. 10, 1960) 285 F. 2d 506 (copper and silver; and

United States v. Iriarte, et al., (CA. 3, 1948)
166 F. 2d 800, cert. denied, 335 U.S. 816 (land per square meter and lots).

The *Silver Queen Mining Company* case, *supra*, is particularly helpful to support Appellee's position herein: This case involved a condemnation of four patented mining claims. The United States Government already had exclusive surface rights for bombing, chemical research and so forth by the Air Force. The Appellee's witnesses, mining engineers, geologists and metallurgists expressed opinions that the lands were potentially valuable as mining properties although largely undeveloped and unproven. Surface showings and samples from a former shaft into one of the mines indicated an ore body containing silver, copper and a deposit of valuable calcium fluoride; that the claims were worthy of development and would in their opinion prove successful; and they would recommend the expenditure of develop-

ment money. They further testified that unproven claims as these were not sold outright for cash in the open market—but under a lease—option arrangement by owners and persons supplying development money wherein the owner was guaranteed a percentage of the ores produced and sold. When that percentage reached an agreed total, the properties became exclusively those of the developer. The witnesses expressed opinions that such a lease-option arrangement could be successfully negotiated for the subject property, and a total purchase price would be \$200,000 payable entirely out of potential ore shipments. Various estimates of the cost of exploration and development were expressed up to \$50,000.

The government experts testified to nil values as mines, that mineral showings were such as to negative existence of ore in commercial quantities and that development was not justified. Their total value was \$2,000 or nominal. The government contended because of complete absence of expert opinion upon cash market value, and because of speculative nature of opinions of value, there was no probative evidence to determine just compensation.

The court held as follows:

“As viewed from purely an academic and definition bound aspect, it would be naive to deny the merit of the government witnesses’ argument. We believe, however, such approach to be too narrow under the circumstances of this case. In order to obtain substantial justice in eminent domain proceedings, it is necessary for the court to adopt working rules to fit the particulars of the case, *U.S. v. Miller, supra*. Such rules have recognized that

all properties do not have a readily proven market value and are not sold upon an open exchange and do not have a standard of comparison available to premise an opinion upon value. Although cash market value may not be proved with certainty, the test of just compensation remains the same, and required proof need rise no higher than the circumstances permit. Some speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas, if the quality of proof of value follows the custom of the industry, is the best available and is sufficient to allow the jury or court to make an informed estimate as to the fact of value, such proof is sufficient to meet the burden. Mr. Justice Brewer as early as 1890, speaking of the problem of ascertaining value for the condemnation of a mining claim, stated:

‘. . . the strip taken ran lengthwise through the claim, and upon the trial, witnesses were permitted to testify as to their opinion and judgment as to its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things the case was susceptible. That this mining claim which may be called “only a prospect” had a value fairly denominated a market value may, as the Supreme Court of Montana well says, be affirmed from the fact that such properties are the constant subjects of barter and sale. Until there has been a full exploiting of the vein, its value is not certain, and there is an element of speculation, there must be conceded, in any estimate thereof. And yet uncertain and

speculative as it is, such prospect has a market value, and the absence of certainty is not a matter of which the railroad company can take advantage when it seeks to enforce sale. *Montana Railway Company v. Warren, et al.*, 137 U.S. 348, 352, 11 Supreme Court 96, 97, 34 L. Ed. 681.'

Estimates and opinions were given as to the possible extent of the deposits, the cost of development and the ultimate reward for the owners if the mines should develop commercially. Admittedly, the quality of proof was such that the jury was faced with the necessity of conjecture; but we do not believe the verdict to be based upon pure speculation, but rather to be an informed finding based upon competent evidence reaching a standard dictated by the nature of the case."

The *Rosamond* case, *supra*, involved condemnation of fee title to a considerable amount of acreage of real property. The government witnesses testified to a highest and best use of said properties for desert homesites. The owners' experts testified that the highest and best use was to extract clay or mud which is used for rotary drilling of oil wells. No such products were ever produced from the subject properties. The owners' witnesses were not permitted to give opinions of fair market value of the mud or clay apart from the value of the land. The court held that experts or lay witnesses could describe the substance, the quantity thereof, the going prices as factors only, upon which an expert might in part base his estimate of the fair market value of the parcels of land in question. The court

ruled that the landowner must make some kind of showing of a market, poor or good, great or small for the commodity in question before the quantity and price of the commodity or substance may be presented to the jury to be used as a factor in the expert's opinion. The court agreed to permit the testimony of proposed cost per ton to remove the salt and sand from the clay (or to beneficiate it) subject to the condition that there be evidence of some market value good or bad, great or small, for the clay so produced and beneficiated. This case adds support to Judge Hall's decision in the instant case.

The discussion in the opinion by this Court of Appeals, in the case of *Phillips v. U.S.*, (C.A. 9, 1957) 243 F. 2d 1 set forth and discussed the type of proof which was competent, relevant and material where land under condemnation were alleged to contain oil and gas.

The case involved condemnation of a ranch. During trial, the owner-appellants, offered to prove by testimony and exhibits that there was an active oil leasing area and there was a value incident to mineral rights as a result. Offer was made of testimony of a geologist with the Shell Oil Company regarding the factors present necessary for exploration for oil and gas. Data as to all existing leases and a showing that almost all the land in and about the subject property to have been leased by major oil companies, was offered. Testimony was offered that oil and gas has been developed in the area for the past 14 years. At the date of the taking, there was an option for mineral rights and oil and gas lease was executed prior to the taking of the subject property and checks were written in advance of the taking against the rent and option for the oil lease. A

deed of the mineral rights had been prepared and offers of proof of such were made. Testimony was offered as to factors governing the decision to drill in the area by major oil companies, and this was to be corroborated by the geology departments of five major oil companies, plus Shell Oil Company. It was offered to prove that other sales nearby reserved oil and gas rights from the sales. The trial judge refused to permit the jury to consider any such evidence and instructed them to utterly disregard any mention of mineral rights.

This Court of Appeals held this to be in error and stated:

“The element of speculation in mineral rights does not preclude their having an ascertainable market value. The Supreme Court answered this question, in the *Montana Railway Company v. Warren*, 1890, 137 U.S. 348, 352, 71 S. Ct. 96, 97, 34 L. Ed. 681 the court said:

‘There remains for consideration but a single point—that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were therefore not the opinions of persons competent to testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that *possibly, perhaps probably*, the same rich vein extended

through its territory. It had not been developed so far that this could be offered as a fact proved. The strip taken ran lengthwise through this claim; and, upon the trial witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, *which may be called only a prospect*, had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects are the constant subject of barter and sale. Until there has been a full exploiting of the vein, its value is not certain and *there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such property has a market value; ...*

In *Eagle Lake Improvement Company v. United States*, (C.A. 5, 1944) 141 F. 2d 562, 564, the following language was used:

'Appellants' principal contention is that the charge of the court erroneously stated the law applicable to the issue of mineral value and was misleading, contradictory and prejudicial. The instruction to which objection was made in substance charged that the jury should find the mineral interests valueless unless from the evidence it was believed that a reasonable probability existed that oil and gas in paying quantities might be produced. As held in *Olson v. U.S.*, 292

U.S. 246, 257, 54 Supreme Court 704, 78 L. Ed. 1236, elements affecting value that depend on occurrences which, though possible, are not reasonable, should be excluded from consideration, as too speculative and conjectural to afford a basis for the judicial ascertainment of values. In Texas, however, a mineral lease is recognized by law as being property having market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities mineral rights are a common subject of barter and sale, and therefore have a definite and ascertainable market value, even where the prospects of successful development are too speculative and remote to be reasonably probable.'

In this circuit the matter has been put beyond cavil by our decision in *Cal-Bay Corporation v. U.S.* (C.A. 9, 1948) 169 Fed. 2d 15, 18, 19, cert. denied, 1948, 335 U.S. 859-860, 69 Supreme Court 134, 93 L. Ed. 406, in which the owners of mineral rights under lease for oil and gas development requested and instructed that, in the determination of value of oil and gas leases, it may be based on the reasonable possibility of production in paying quantities even though there were not a reasonable probability shown on such value. In that case, we quoted from the Eagle Lake case, *supra*, and we held:

We think the District Court erred in refusing the instruction. We take notice that in Califor-

nia discovery in land of a reasonable probability of successful development are too speculative to be reasonably probable. The evidence, later quoted, shows there are hundreds of sales of lessor and lessee's rights in lands which sets speculative value. . . . The court foreclosed the appellant from making any proof as to either the possibility or probability of the existence of mineral deposits in their land. We think that such exclusion of evidence was error."

The *Georgia-Kaolin Company v. U.S.*, case, reported at 214 F. 2d 284, 286 (C.A. 5, 1954), cert. denied, 248 U.S. 914, is mentioned by Appellant in its brief in discussing the opinion of the District Court and the *Rosamond Lake* case, *supra*. In *Kaolin*, the ruling was merely that in the damage case before the court involving a breach of covenant in a lease which covenant provided for the return of the leased premises in good condition, the measure of damages in the case would be the difference in value between the leased land at the time of its leasing and its *value for all purposes* [emphasis added] at the time of its return to the lessor at the expiration of the lease. Contrary to the owner's theory of placing a separate value of the alleged kaolin deposits, the existence of kaolin is only one element that is to be considered with other elements and there cannot be a recovery of the value of the land and of the mineral rights as separate items.

This is the breadth of the holding of the case of *Mills v. U.S.*, 363 F. 2d 78 (C.A. 8, 1966) which case embraced testimony ignoring sales nearby, ignoring the expense significance of the depth of overlay varying from 80 to 230 feet, ignoring the costs of production

and of abandonments of coal mines nearby. The court stated that mere adaptability does not establish market value and the owner's value testimony was entirely speculative and simply a product of estimating reserves of coal and multiplying by 25 cents per ton.

In the case of *United States v. Whitehurst*, (C.A. 4, 1964) 337 F. 2d 765, also cited by Appellant (Appellant's Brief pp. 14, 22, 25, 26 and 28), here again the condemnation involved the taking of fee title, that is, the surface rights as well as the underlying interests. All of the area condemned had been used only for farming. A small pit was located in a portion of the remainder and had been excavated for sand and fill material for the very project which was involved in the taking and in the condemnation, namely, the Navy Air Station. The Court of Appeals reversed the judgment of the lower court which was based on findings of a Commission. The findings having been made in reliance on testimony of a witness who had never appraised a sand and fill deposit and had used a capitalization rate on nearly all of the soil and subsurface deposits an average depth over a 35 year period. The same witness relied mainly on the opinions of others and these opinions were in turn based on sales to the condemnor of fill material for the subject Navy Air Station (the record showing that all sales except to the Navy Base were merely nominal). The Commission had ignored all comparable sales, which were described in detail and five of which contained comparable de-

posits, but the sales prices nevertheless had reflected the values of farm land. The court disapproved of this "out of hand rejection of the comparable sales" by the Commission. The court further stated, however, at p. 776:

"We do not hold that the use of capitalization of income to determine the value of a borrow bit should be rejected as inappropriate in every case. On the contrary, if all of the factors, which must necessarily be taken into account are established by the proper evidence, there would appear to be no valid reason to judicially condemn, prohibit or outlaw the use of this method."

In a 1965 case, the Court of Appeals for the 8th Circuit in *Hembree v. U.S.*, 347 F. 2d 108, was considering a condemnation case. The government witnesses contended that the highest and best use was for grazing purposes; whereas the owner's witnesses testified that it was for the quarrying of limestone for residential development. The court, after a preliminary hearing and considering a number of witnesses and exhibits, granted appellee's motion denying the submission of this factual issue to a jury as the evidence was insufficient. The evidence had shown that an eight foot stratum of limestone was under each parcel of land and such deposit contained carbonates which are useable in agriculture. Some previous quarrying had been done under a lease but had been discontinued and limestone had been extracted, processed and sold. Two expert witnesses testified to an existing and growing

market for such limestone. Records of former quarry operators showed royalties paid in the years 1955 to 1957 and the dollar amounts of such operating profit, without reserve for depreciation and taxes.

The court reversed the trial court's holding and stated that the limestone issue should have been submitted to the jury, stating:

"We believe that *Cade v. U.S.*, supra, involving a deposit of granite rock; *U.S. v. Rayno*, supra, involving hardpan, and *National Brick Company v. U.S.*, 76 U.S. App. D.C. 329, 131 F.2d 30 (1942) are more apposite [than the cases relied upon by the government.]"

3. Appellant's Valuation Testimony Had No Probative Value, the District Court's Findings on Value Are Well Within the Valuations Testified to by Appellee's Witnesses and the Judgment Should Be Affirmed.

It is submitted that this record fully support Judge Hall's finding that the testimony of Appellant's witnesses had no probative value.

The court found as a matter of fact and law that American Pumice Company was entitled to the value of its interest in the claims Donna 3 and 4 and Ray-Gill No. 31 from the date it was excluded (May 29, 1945) as if there had been no revision of the boundaries, no amendment to the complaint and no order of dismissal. Testimony was introduced by Appellee's witnesses Frederick and King as to the value of the interest of Ameri-

can Pumice Company for the ten and one half year period of \$938,000 and \$600,000 respectively [Tr. 1074, 861]; by the witness Schmidt \$700,000 [Tr. 1249]. The Court found that the economic life for said claims was a period of only five years and found the fair market value to be \$110,000.

The total value of the Brown group of claims which the Court found were owned by American Pumice Company was \$57,250.

The valuations established by the judgment for this group of claims are substantially below the testimony of Appellee's witnesses, to wit, King \$310,000 [Tr. 837-838] and Frederick \$251,000 [Tr. 1067, 1174-1175]. Schmidt did not testify as to the Brown group of claims.

The Court heard testimony that Schmidt, while employed by the government, had expressed an opinion in a report at about the date of taking by the government that there was \$500,000 worth of pumice in Ray Gill No. 31. The court also heard testimony from the Appellant's witness Newby that while he was operating the subject claims for Desert Materials Company, he applied for a Reconstruction Finance Corporation loan and supported the application with a valuation report by F. Sommer Schmidt (Appellee's witness in the instant case) showing a market value of \$751.852 with projected net profits of \$137.808 per year for 10 years [Tr. 1834-1837].

Judge Hall was entitled to consider this testimony. It manifestly does not enhance appellant's protestations that profits were unobtainable.

For all of the foregoing reasons, it is submitted that the District Court has correctly ruled in the premises, and has not committed reversible error.

Conclusion.

The Judgment of the District Court should be affirmed.

Respectfully submitted,

HODGE L. DOLLE,

VICTOR R. HANSEN,

By HODGE L. DOLLE,

Attorneys for Appellees.

Dated: July 11, 1968

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR R. HANSEN



*See Vol.
3387*

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METLOX MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 20,299 ✓

PETITION FOR REHEARING

FILED

MAR 1967

WM. G. LUCK, CLERK

MAR 21 1967

SHEPPARD, MULLIN, RICHTER & HAMPTON

458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

1 TO THE HONORABLE JUDGES OF THE UNITED STATES
2 COURT OF APPEALS FOR THE NINTH CIRCUIT:
3

4 The errors in this Court's present decision place
5 this cause squarely in conflict with the Board's own
6 published interpretation of its own order in this case and
7 with decisions of the United States Supreme Court and of
8 another Court of Appeals.
9

10 The two-to-one divergence between Judges Washington,
11 Browning and Barnes underscores these errors and conflicts,
12 and calls for rehearing en banc.
13

14 THE ERRORS
15

16 Metlox claimed inability to pay and substantiated
17 this by supplying profit and loss statements to the Union
18 and by offering to give a certified public accountant chosen
19 by the Union unlimited and carte blanche access to the
20 Company's books to verify the accuracy of the claim.
21

22 In view of Metlox's offer of complete substantiation
23 of its claim of economic inability, it is error for this
24 Court to hold that Metlox did not bargain in good faith, and
25 it is error for this Court to say (1) that this case "turns
26 on the extent to which" Metlox must disclose to the Union to

1 salaries paid to management, (2) that the profit and loss
2 statements did not disclose sufficient information from
3 which a fair judgment could be made by the Union as to the
4 Company's claimed inability to pay, and (3) that the infor-
5 mation as to payments to management, denied by the Company,
6 were "relevant" and "reasonably necessary" to the Union.
7 All of these matters are irrelevant to whether Metlox, in
8 good faith, claimed inability to pay. The only issue in this
9 case is whether Metlox made the claim in good faith, not
10 whether it was right in its business decision as to what it
11 could, or could not, afford to do.

12
13 The majority opinion of this Court goes far beyond
14 and is in direct conflict, not only with decisions of the
15 Supreme Court and another Court of Appeals, but with the
16 Board's own interpretation, in another case, of its own
17 decision in this case. In that other case, the Board says
18 that its own decision in this case does not stand for that
19 which this Court has said it stands, and says that nothing
20 more is required as evidence of Metlox's good faith than
21 that which Metlox in fact offered. Such disclaimer by the
22 Board in that other case shows not only that the Board's
23 conclusion in this case that Metlox exhibited lack of good
24 faith is wrong, but that the Board has led this Court into
25 the error of compounding the Board's error. As Judge Barnes
26 said, "I believe that if the Board's order is enforced as it

stands, this case will make law beyond the implications of the facts of this case."

THE CONFLICTS

1. This Court's decision in this case is in square conflict with the Board's own published statements in White Furniture Co., 161 NLRB No. 23, 63 LRRM 1277 (1966) that, in the Metlox case,

a. "The Board has also declined to require an employer [Metlox] to give a union such sensitive information as executive salaries and detailed breakdowns of operating expenses." (63 LRRM at 1278); and

b. "The Board there [in Metlox] approved a check of the employer's books by a union accountant, limited to the purposes of verifying profit and loss figures offered by the employer and determining whether there were any factors that would make the employer's figures misleading." (63 LRRM at 1278.)

2. This Court's decision in this case is in square conflict with the United States Supreme Court's decision in NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 100 L. ed 1027, 76 S. Ct. 753 (1955),

1 a. that where an employer claims inability to
2 pay a wage increase, good faith bargaining requires
3 only that the claim be an honest claim and that, as
4 Metlox did here, the employer need do no more than
5 furnish "some sort of proof of its accuracy"
6 (351 U.S. at 152-153, 100 L. ed at 1032); and
7

8 b. that a claim of economic inability to pay a
9 wage increase does not automatically entitle the
10 employees to substantiating evidence (351 U.S. at
11 153, 100 L. ed at 1032).
12

13 3. This Court's decision in this case is in square
14 conflict with the Court of Appeals for the District of
15 Columbia's decision in Fruit and Vegetable Packers v. NLRB,
16 316 F. 2d 389 (D.C. Cir. 1963),
17

18 a. that a company, as Metlox did here, may cir-
19 cumscribe the manner in which it makes its books
20 available for inspection (316 F. 2d at 390-391); and
21

22 b. that the Board was correct in repudiating in
23 its decision affirmed in Fruit and Vegetable Packers
24 (Yakima Frozen Foods, 47 LRM 1472, 1473-1474) state-
25 ments of principle and law inconsistent with the
26 doctrine that

1 "Under the Truitt principle, the obligation
2 to furnish substantiating evidence does not
3 'automatically' follow a claim of inability to
4 pay, nor is the employer obligated to substan-
5 tiate the claim; it is enough if the employer
6 [as Metlox did here] in good faith attempts to
7 substantiate it." (Affirmed 316 F. 2d 389.)
8

9 THERE SHOULD BE REHEARING EN BANC
10

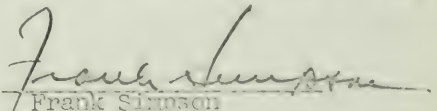
11 Because of the divergence between the opinions of
12 Judges Washington, Browning and Barnes, and because of the
13 conflicts between this Court's decision and the decisions of
14 the United States Supreme Court and the Court of Appeals for
15 the District of Columbia and the Board's own interpretation
16 of its own decision in this case, petitioner respectfully
17 suggests that a rehearing en banc is the only appropriate
18 way to resolve these conflicts.

19 DATED: March 7, 1967.

20 Respectfully submitted,

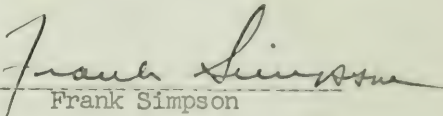
21 SHEPPARD, MULLIN, RICHTER & HAMPTON

22
23 By


24 Frank Simpson
25 Attorneys for Petitioner
26 Metlox Manufacturing Company

CERTIFICATE OF COUNSEL

Pursuant to Rule 23, I, Frank Simpson, one of the attorneys for petitioner herein, do hereby certify that in my judgment the foregoing petition for rehearing en banc is well founded and it is presented in good faith and not interposed for delay.


Frank Simpson

CERTIFICATE OF SERVICE

I, the undersigned, say that I am and was at all times herein mentioned a citizen of the United States and a resident of the County of Los Angeles, California, over the age of 18 years and not a party to the within action; that my business address is 458 South Spring Street, Los Angeles, California 90013; that on March 7, 1967, I served the PETITION FOR REHEARING dated March 7, 1967, on the below-named counsel in said action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Government at 458 South Spring Street, Los Angeles, California, addressed as follows:

General Counsel
National Labor Relations Board
21st Region
849 South Broadway
Los Angeles, California 90014
Attention: George A. Pappy, Esquire

Alfred M. Klein, Esquire
Messrs. Rose, Klein & Marias
315 West Ninth Street
Los Angeles, California 90015
(on behalf of International Brotherhood
of Operative Potters, AFL-CIO)

Plato E. Papps, Esquire
1300 Connecticut Avenue
Washington 6, D. C.
(on behalf of International Brotherhood
of Operative Potters, AFL-CIO)

1 and three copies of the above-named documents to:

2 Marcel Mallet-Prevost, Esquire
3 Assistant General Counsel
4 National Labor Relations Board
5 Washington, D. C. 20570

6 I declare under penalty of perjury that the
7 foregoing is true and correct.

8 Executed on March 7, 1967, at Los Angeles,
9 California.

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11 Grace Gelches
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM RICHARD FERGANCHICK,
ROBERT CLARK FERGANCHICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

JAN 3 1957

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM RICHARD FERGANCHICK,
ROBERT CLARK FERGANCHICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTION AND STATEMENT OF THE CASE

This is an appeal from a judgment of conviction on a one-count indictment which was returned by the Federal Grand Jury for the Southern District of California on February 26, 1964 [C. T. 2-3]. ^{1/}

The indictment charges each appellant with the robbery of the Pioneer National Bank on January 15, 1964, and in committing the offense placing lives in jeopardy by the use of two guns,

^{1/} C. T. refers to Clerk's Transcript.

dangerous weapons, and devices.

On April 14, 1964, appellants filed a motion to suppress evidence, and on May 4, 1964, a hearing was held. At the hearing appellants conceded that the arrest was lawful and supported by probable cause but raised the issue that two searches were not incident to the arrest [C. T. 6; R. T. 25, 34 of Vol. II]. ^{2/} The motion was denied [Vol. II, R. T. 66].

On November 13, 1964, trial by jury was commenced, the Honorable William J. Lindberg, District Court Judge presiding. And on November 17, 1964, the jury returned a verdict of guilty as charged [C. T. 32-35].

On February 24, 1965, each appellant was sentenced to imprisonment for a period of twenty-five years pursuant to Section 4208(a)(2) of Title 18, United States Code; each sentence to run concurrently with sentences each of the appellants was serving for the State [C. T. 46].

On March 8, 1965, each appellant filed a notice of appeal [C. T. 149].

The jurisdiction of the District Court is predicated on Title 18, United States Code, Sections 2113(a) and (d). And this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

^{2/} R. T. refers to Reporter's Transcript.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a) and (d) provides in pertinent part:

"(a) Whoever by force and violence or by intimidation, takes, or attempts to take, from the person or presence of another any property or any other thing of value belonging to, or in the care, custody, control, management or possession of any bank or any savings and loan association. . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (d) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than 25 years, or both. "

III

STATEMENT OF FACTS

On January 15, 1964, Pioneer National Bank was a national bank, member of the Federal Reserve System, and a bank whose deposits were insured by the Federal Deposit Insurance Corporation [R. T. 70].

At approximately 1:00 P. M. on that date employees Ronald

Hunt, Jeanne Liebig, Mary Louise Thielemann and customer Wendell Schaefer were present in the bank [R. T. 82]. Appellants entered the bank and utilizing the ruse of a loan application they were directed to Ronald W. Hunt, bank cashier. Robert Ferganchick sat in a chair at Mr. Hunt's desk and introduced himself as Alexander Kirkaby [R. T. 83-84]. At about this time, each appellant drew a revolver and announced, "Everyone is to do as they are told and not to worry".

Appellants ordered the bank personnel and customer into a rear supply room. Teller Mary Louise Thielemann became hysterical with fright and cashier Ronald Hunt had to assist her to the rear room [R. T. 86, 139]. In the supply room appellants ordered the men to lie face down on the floor and then bound their hands and feet with twine [R. T. 88, 145]. Thereafter appellants proceeded to rob the bank of \$14,818.38 [R. T. 91].

At the trial Jeanne Liebig identified Robert Ferganchick as the gentleman who had inquired about a loan and the three other witnesses identified both appellants as the two men who robbed the Pioneer National Bank on January 15, 1964 [R. T. 84, 86, 141, 166, 177]. The witnesses testified that each appellant carried what appeared to be revolvers and Mr. Hunt and Mr. Schaefer, who were more knowledgeable on the subject, stated that appellants used .32 or .38 caliber revolvers during the bank robbery [R. T. 97-100, 142-143]. When appellants were arrested on February 19, 1964, each man was armed with two loaded guns [Exhibits 4-7; R. T. 263-276]. Exhibit 4 was Robert Ferganchick's .38 caliber

revolver [R. T. 147, 263-265]. Exhibit 6 was William Ferganchick's .32 caliber revolver [R. T. 147, 265-276].

A latent fingerprint expert testified that at approximately 2:15 P. M. on January 15, 1964 he examined the premises at Pioneer National Bank and discovered the palm print of Robert Ferganchick on the left arm of the chair in front of Mr. Hunt's desk [R. T. 240, 253].

A special agent of the Federal Bureau of Investigation testified to his post-arrest interview of appellants wherein Robert Ferganchick in the presence of William Ferganchick admitted that they were the two men with guns who robbed the Pioneer National Bank of in excess of thirteen thousand dollars on January 15, 1964 [R. T. 300-301]. Additionally, appellants admitted that part of the eighteen hundred dollars taken from their person at the time of arrest was bank robbery proceeds [R. T. 302].

IV

ARGUMENT

- A. THE ARREST WAS VALID (1) AS SUPPORTED BY A WARRANT KNOWN OF BY THE ARRESTING OFFICER, (2) AS A LAWFUL ARREST WITHOUT A WARRANT, AND (3) AS A LAWFUL ARREST WITHOUT A WARRANT FOR THE ASSAULT UPON THE ARRESTING OFFICER.
-

On February 19, 1964 William Reese, a policeman for the City of South Pasadena, unexpectedly observed appellants at the

Santa Anita Race Track and arrested them. William Ferganchick resisted and assaulted Officer Reese during the course of the arrest [R. T. 261-263].

Pursuant to this arrest, four loaded guns and \$1,800 were removed from appellants' persons [R. T. 263-267, 272-273]. The guns were admitted into evidence [Exhibits 4-7; R. T. 272], and testimony was offered to the effect that part of the money was proceeds of the January 15, 1964 robbery of the Pioneer National Bank [R. T. 302]. Appellants claim the arrests were illegal and therefore the aforescribed evidence was inadmissible.

Following the armed robbery of Beneficial Finance in South Pasadena, the police department had obtained a felony warrant for appellants. Officer Reese had not personally obtained the arrest warrant but the fact that he knew of the South Pasadena felony warrant's existence was one of the main reasons that Officer Reese arrested the appellants on February 19, 1964 [R. T. 218, 226-227]. And prior to trial of the instant case, appellants plead guilty to the offense described in that warrant [R. T. 221-222].

Officer Reese testified to his additional reasons for making the arrest. In January, 1964, he first saw a special bulletin issued by the Sheriff's Department. A copy of this bulletin was posted on the board at the South Pasadena Police Department and Officer Reese carried a copy of the bulletin in his patrol car [Exhibit 19; R. T. 218-219]. The Sheriff's Bulletin dealt solely with the Ferganchick brothers and stated that appellants were wanted for twenty-four robberies in the Southern California area. The Sheriff's

bulletin listed the robberies, described appellants' physical appearance and appellants' modus operandi [Ex. 19]. Furthermore, the South Pasadena Police Department had also placed police photographs or "mug shots" of appellants in each police vehicle and on the department bulletin board. Officer Reese received the photographs in November, 1963 [R. T. 220]. And, finally, Officer Reese had learned through his police department that robbery victims had identified appellants [R. T. 223-224].

Appellee submits that whether this arrest is viewed as an arrest pursuant to a warrant, or as an arrest without a warrant but supported by probable cause, the foregoing facts clearly demonstrate a lawful arrest.

Appellant has not brought the warrant or the complaint before this Court by designating it on appeal, nor is it set forth in his brief. However, even assuming arguendo that there was something defective in the warrant, the instant arrest would still be valid as a lawful arrest without a warrant.

The validity of an arrest without a warrant is to be determined by the law of the state in which the arrest was made. Miller v. United States (1958), 357 U. S. 301, 2 L. Ed. 2d 1332, 78 S. Ct. 1190; United States v. Di Re (1948), 332 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 210. Under California law, an arrest without a warrant is justified if the arresting officer has probable cause to believe that the person arrested has committed a felony. People v. Coleman (1965), 45 Cal. Rptr. 542, 235 Cal. App. 2d 612; California Penal Code, Section 836.

Thus, even an arrest made under the authority of a defective complaint or warrant is valid, if probable cause existed to make a lawful arrest, independent of the defective complaint or warrant. People v. Tillman (1965), 47 Cal. Rptr. 614. This is true under federal law, as well as California State law. Go-Bart v. United States (1930), 282 U. S. 344, 356, 51 S. Ct. 153, 75 L. Ed. 374. And see also: United States v. White, 342 F.2d 379 (4 Cir. 1965) where the Court said, at page 381:

"While the district court did not find it necessary to pass upon the validity of the arrest warrant, we think that document was clearly invalid because the complaint on which it was issued contained only unsupported hearsay, without an allegation that the officers had reason to believe that their informer was trustworthy. Nevertheless, the fact that the authorities apparently relied upon an invalid arrest warrant would not invalidate the arrest and the search and seizures which took place as incidents thereof if the officers had adequate knowledge independent of the warrant to constitute probable cause (citations)."

Probable cause for arrest without a warrant is not limited to evidence that would be admissible at trial on the issue of guilt; the test is whether the facts as they appeared to the officers at the time of the arrest were such that a reasonable man would conclude that the arrested person should be held to answer. People v.

Murphy, 173 Cal. App. 2d 367, 377, 343 P. 2d 273 (1959).

The Government submits that the facts, known to Officer Reese at the time of the arrest, were such as would lead a reasonable man to conclude that the appellants should be taken into custody.

People v. Luckman (1961), 198 Cal. App. 2d 347, 18 Cal. Rptr. 167.

However, even assuming, for the sake of argument, that the warrant was defective and that there was no probable cause to arrest appellant for armed robbery without a warrant, Officer Reese still had probable cause to arrest for the assault with intent to commit murder. The assault was perpetuated by appellant upon the person of Officer Reese at the time of the arrest for armed robbery, and appellant was subsequently booked on the assault charge [R. T. Vol. II, p. 20].

In conclusion, the Government submits that the arrest must be upheld for the following reasons:

1) That the arrest was supported by the existence of a warrant which was within the knowledge of the arresting officer - a warrant describing an offense to which appellants subsequently plead guilty - and which warrant is not now before this Court for examination into any alleged defect.

2) That the arrest was supported by probable cause, independent of any alleged defect in the warrant on the complaint.

3) That the arrest was valid as an arrest without a warrant for the assault with intent to commit murder upon Officer Reese (which was the first offense appellant was booked under).

B. THE CONFESSION OF ROBERT FERGANCHICK WAS NOT ILLEGALLY OBTAINED.

Shortly after 3:00 P. M. on February 19, 1964, appellants were arrested at the Santa Anita Race Track [R. T. 258]. During the arrest William Ferganchick assaulted Officer Reese [R. T. 261-263]. Appellants were then transported to Arcadia Police Department, which had jurisdiction over the place of arrest, where they were booked on a charge of assault with intent to commit murder [R. T. Vol. II, p. 20]. After completion they were transported to the South Pasadena Police Department, arriving shortly after 5:00 P. M. [R. T. 273-274]. At approximately 6:30 P. M., appellants completed the booking procedure at South Pasadena Police Department [R. T. 274].

Since appellants had initially been arrested after 3:00 P. M., they could not be arraigned until 2:00 P. M. the following day, which was the time established by the Pasadena courts for arraignment [R. T. 275].

Between 6:30 P. M. and 8:30 P. M., appellants were questioned.

At 8:00 P. M. a special agent of the Federal Bureau of Investigation arrived at the police department. A Federal complaint for the robbery of Pioneer National Bank had been issued [R. T. 206].

At 8:30 P. M. the Special Agent was invited to join the interview of Robert Ferganchick [R. T. 296]. The Special Agent

identified himself and displayed his credentials. He advised Robert Ferganchick that he need not make any statements; no threats or promises were being made in order to induce a statement; any statement could be used against him in a court of law; and, that he had a right to consult an attorney before making any statement [R. T. 297].

Robert Ferganchick still refused to answer any questions and at 9:00 P. M. he said he wanted to talk to his brother, which he was allowed to do, and there was a break in the interview until 10:00 P. M. At 10:00 P. M., appellants were present and the Special Agent repeated the aforescribed constitutional warning to both [R. T. 298-299]. Thereafter, Robert Ferganchick in the presence of William Ferganchick admitted they were the armed men who robbed the Pioneer National Bank on January 15, 1964 [R. T. 300-301].

Appellants contend the testimony regarding the confession was admitted in violation of Mallory v. United States, 354 U.S. 449.

Appellants had on separate occasions been interviewed between 6:30 P. M. and 9:00 P. M. It is to be noted that one police captain directed the questioning. Thus, each appellant was not questioned for the entire two and one half hours [R. T. 282].

When appellants confessed to the FBI agent at 10:00 P. M., they were in the custody of the Pasadena Police Department for armed robbery of the Beneficial Finance Company. That this was a valid State Custody is indicated by the fact that the Federal warrant was returned unexecuted and the instant case was initiated by

indictment [R. T. 206]. In addition, appellant entered a plea of guilty to said robbery of the Beneficial Finance Company prior to the trial in the instant case [R. T. 221-222].

Because during the period of detention questioned here, appellants were in state, not federal, custody, Rule 5(a) of the Federal Rules of Criminal Procedure has no applicability.

As the United States Court of Appeals for the Fourth Circuit stated in Carpenter v. United States (1959), 264 F.2d 565, 571:

"Federal rules and statutes governing the arraignment of persons in federal custody have no application, however, to the arraignment by state officials of state prisoners, unless, of course, the state officials are acting for, and under the direction of, federal agents under circumstances which fairly warrant the conclusion that the custody is federal in substance (citations)."

And, in this regard, the Court went on to point out that:

"The arresting officer was executing no federal warrant. As soon as he identified Carpenter, he arrested him, not because of any command of the FBI, but because he was believed to be a dangerous felon wanted for prosecution in other jurisdictions. The officer was neither under the control nor the direction of the FBI, and his custody was that of the state, which could not be converted into federal custody merely by reason of the prior receipt of the

widely broadcast FBI flier." (at page 572).

In the instant case the "flier" was put out by the Los Angeles County Sheriff's office, not the FBI [Exhibit 19].

Appellee will assume, therefore, that the question of whether the confession was obtained during a period of unlawful detention must be governed by California state law.

The transcript shows that the subjects were arrested at 3:00 P. M. on February 19, 1964, and that a magistrate would not again be available for arraignment until 2:00 P. M. the following day [R. T. 275]. California Penal Code, Section 825 provides that the defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays. Since there is no indication in the record that appellant was not arraigned in accordance with these California procedures, it cannot now be urged on appeal that the confession was taken during a period of illegal detention.

People v. Twiggs, 223 Cal. App. 2d 455,

35 Cal.Rptr. 859 (1963).

Appellant appears to contend, further, that the confession should have been excluded because of failure of intelligent waiver in regard to the right to counsel and the right to remain silent. In support of this, appellant cites the readily distinguishable case of Westover v. United States, 374 U.S. 436, 494-497 (decided June 13, 1966).

First, it should be noted that Westover, which is one of the



companion cases to Miranda v. Arizona, 384 U.S. 436 (1966), has no application in this appeal, since trial took place November 13, through 17, 1964. Johnson v. New Jersey, 384 U.S. 719 (1966).

Furthermore, Westover involved overnight questioning of some 14 hours at the hands of local police before three FBI agents arrived on the scene and continued the questioning for an additional two and one-half hours.

In the instant case, on the other hand, appellant Robert Ferganchick was questioned only from 6:30 P. M. until 8:30 P. M. before the FBI intervened with a full and complete warning under Escobedo [R. T. 297]. When, at 9:00 P. M., appellant Robert Ferganchick requested to see his brother William, he was immediately allowed to do so. And the brothers held a personal conversation until 10:00 P. M., at which time the brothers were again warned of their constitutional rights before being allowed to confess [R. T. 298-299]. The Government submits that the facts in this case clearly demonstrate an intelligent waiver of appellants' constitutional rights.

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jo Ann I. Dunne
JO ANN I. DUNNE

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BRIEF FOR THE APPELLEE

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COUNTER-STATEMENT OF THE CASE

Defendant's statement of facts is sufficient. The opinion of the trial court is reported in United States v. Benner, 289 F.Supp 860, D.C. Or., 1968). The text of the opinion is contained in Appendix A.

THE FIFTH AMENDMENT IS NOT APPLICABLE

The sole issue raised is whether or not defendant's Fifth Amendment right against self-incrimination should have barred his conviction under 26 U.S.C. § 5851 for possession of a firearm not manufactured in accordance with 26 U.S.C. § 5821. Haynes v. United States, 390 U. S. 85 (1968) is conceded to be the controlling case. Research by the Government has produced six cases decided subsequent to Haynes involving convictions analogous to defendant's. Five support the lower court decision in United States v. Benner, 289 F. Supp. 860 (D. Or., 1968). ^{1/}

Defendant contends Form 1A, Declaration of Intent to Make a Firearm (Appendix B), cannot be used in any manner without incriminating the declarant (D. Br. 12) and that the only major effect of § 5821 is production of incriminating information (D. Br. 13).

This contention is not consistent with 26 C.F.R. § 179.78 which provides;

"...The declaration must be supported by a certificate of the local Chief of Police, Sheriff of the County, United States Attorney, United States Marshall or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division...that the firearm is intended by such person for lawful purposes." [Emphasis added].

^{1/}
Reed v. United States, 401 F.2d 756 (8th Cir., 1968); Verities v. United States, ___ F.2d ___ 4Criminal Law Reporter 2246 (1st. Cir., 1968); United States v. Casson, 283 F. Supp. 86 (D. Del., 1968); United States v. Taylor, 286 F. Supp. 683 (E. D. Wis., 1968); cf. De Puch v. United States, 401 F.2d 346 (8th Cir., 1968). Contra, United States v. Stevens, 286 F. Supp. 532 (D. Minn., 1968).

The requirements of § 5821 "establish the legality, rather than the illegality, of the possession of a firearm." Haynes v. Taylor, 286 F. Supp. 683, 684 (E. D. Wis., 1968) citing United States v. Hayes, 319 F.2d 71, 73 (10th Cir., 1963).

Therefore, the purpose of § 5821 is diametrically opposed to that of § 5841 which is "...directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements and who therefore are immediately threatened by criminal prosecutions under § 5851 and 5861," Haynes v. United States, supra, p. 96. A maker would already have possession and there is no provision for a possessor to legitimize his possession by compliance with § 5821 after the firearm has been manufactured. United States v. Taylor, 286 F. Supp. 683, 684 (E. D. Wis., 1968).

The underlying offense in Haynes was the possession of a firearm which had not been registered as required by § 5841. In the case at bar, defendant was not convicted of a failure to comply with § 5821 prior to the firearm's manufacture. He was convicted for possession of an illegally made firearm.

If the gun was made prior to defendant's acquisition, the offense was complete upon defendant's receipt. Compliance with § 5821 by the maker would not amount to self-incrimination on the part of the defendant. United States v. Cannon, 288 F. Supp. 86, 90 (D. Del., 1968).

Therefore, self-incrimination may not be used as a defense because defendant, as a possessor, was not required to register or otherwise incriminate himself. United States v. Taylor, 286 F. Supp. 683, 684, (E.D. Wis., 1968); cf. Reed v. United States, 401 F.2d 756, 763, (8th Cir., 1968). Also see United States v. Barker, 289 F. Supp. 860, 861 (D. Or., 1968).

Assuming defendant was the maker, he also would not be able to assert self-incrimination as a defense. Once the firearm has been manufactured, possession of it is an offense under § 5851. Section 5821 (c) provides that "...[the] tax shall be paid in advance of the making of the firearm." Section 5821 (c) also provides that the required declaration shall be made "...prior to such making..." [Emphasis added]. There is no provision under § 5821 for the possessor to legitimize his possession by subsequently complying with § 5821. United States v. Taylor, supra, p. 634.

The self-incrimination privilege should not extend to a maker charged with a violation of § 5851 since the charge relates to possession of an illegally made weapon, not its manufacture. The scienter required by the statute is merely a "knowing possession." Sipes v. United States, 321 F.2d 174, 179 (8th Cir., 1963) cert. denied 375 U.S. 913 (1963); Hesslywood v. United States, 208 F. Supp. 622 (N.D.Cal., 1962); United States v. Hayes, 208 F.Supp. 550 (D. Colo., 1962), Aff'd. 319 F.2d 71 (10th Cir., 1963).

There must be a substantial and real hazard of incrimination before the Fifth Amendment may be invoked as a defense. Marchetti v. United States, 390 U.S. 39, 52-53 (1968). The risk of incrimination under § 5851 for one who complies with § 5821 is "speculative and unsubstantial. Under Marchetti this is not enough." United States v. Cassen, 288 F.Supp. 86, 90 (Del., 1968).

Registration information acquired under § 5841 is made available to state authorities pursuant to 26 U.S.C. § 6107. However, information given in conformance with § 5821 is not made available under 26 U.S.C. § 6107. In Haynes v. United States, supra, p. 99-100, the Supreme Court noted that " . . . provisions of 26 U.S.C. § 6107 are applicable to the

special occupational taxes imposed by § 5801, although not, apparently, to the making and transfer taxes imposed by §§ 5802 and 5803.

[Emphasis added.]

An individual filing a declaration under § 5821 must obtain certification from a local official that the gun will be used for lawful purposes. Undoubtedly, the prospective manufacturer would be informed by the local official if the firearm would be in violation of any applicable statutes.

Also, 26 C.F.R. § 179.79 requires a declarant to obtain the approval of the Director, Alcohol and Tax Division, prior to making the firearm. As a matter of policy, the Alcohol and Tax Division will not grant approval if the firearm manufacture will constitute a violation of Federal, State or local law.

The issue of whether the required filing of a declaration of intention to make infringes upon the constitutional privilege against self-incrimination was raised in United States v. Mares, 319 F. 2d 71 (C.A. 10, 1963). In that case a defendant was convicted of one count charging possession of a sawed-off shotgun which he had not registered pursuant to Section 5841 and of a second count charging possession of a firearm made in violation of Section 5821. On appeal, the Tenth Circuit set aside the conviction on count one because Mares had raised a proper claim of privilege under the Fifth Amendment. As to the remaining count, the court said at page 73:

"The declaration requirement contained in 26 U.S.C. 5821(c) does not violate the constitutional safeguard against self-incrimination in respect to prosecution for possession of firearms illegally made... Section 5821 requires one who desires to sell/borrow to file a declaration of intent with the Secretary of the Treasury and to pay the prescribed tax. In contrast with Section 5841, there is no self-incrimination inhering in the filing of the latter declaration or the payment of the tax. The declaration and payment required by Section 5821 would establish the legality, rather than illegality, of the possession of such a firearm."

The purpose of § 5821 in requiring "considerably more information than § 5841" (D.Br. 6) works to the advantage of an applicant since the information is used to insure the legality of the firearm. The possessor of an illegally manufactured firearm is not obliged to register as stated in Defendant's Brief at page 6. A proper claim of one's Fifth Amendment right against self-incrimination is a full defense to a charge of failure to register a firearm pursuant to § 5851. Haynes v. United States, 390 U.S. 85, 100 (1968).

The Supreme Court stated at page 90:

"...We are required only to resolve the narrow issue of whether enforcement of § 5851 against petitioner, despite his assertion of the privilege against self-incrimination, is constitutionally permissible."

Several recent decisions have refused to expand Haynes to cover other portions of the Act. Rood v. United States, 401 F.2d 756 (8th Cir., 1968); United States v. Taylor, 286 F.Supp. 683 (E.D.Wis., 1968); United States v. Banner, 289 F.Supp. 860, 861 (D.Or., 1968).

The only decision to the contrary is United States v. Stevens, 286 F.Supp. 532, 535 (D.Minn., 1968) which held § 5821 to be

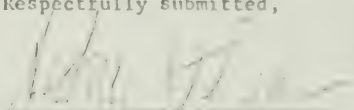
unconstitutional on the ground that it required indiscriminate information.

However, the subsequent Eighth Circuit decision was held to the contrary (the District Court for the District of Minnesota falls within the jurisdiction of the Eighth Circuit). Boyd v. United States, 401 F.2d 756 (8th Cir., 1968); Dr. Fuch v. United States, 401 F.2d 346 (8th Cir., 1968).

CONCLUSION

It is submitted that this Court should find that a violation of 26 U.S.C. § 5851 by non-compliance with 26 U.S.C. § 5821 does not fall under the self-incrimination clause of the Fifth Amendment. This Court should affirm the judgment of the court below and find defendant guilty of the above violation as set forth by the United States Attorney's Information.


Respectfully submitted,



SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I have made service of the foregoing Brief for the Appellee on the Appellant, Charles Edward Benner, by depositing in the United States Post Office at Portland, Oregon, on January 9, 1969, a certified true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to William V. Bierck, Esq., Suite 108, Lloyd Plaza, 1425 N. E. Irving Street, Portland, Oregon, 97234, attorney of record for Appellant.



SIDNEY I. LEZAK
United States Attorney
District of Oregon
Of Attorneys for the Appellee

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff

v.

CHARLES EDWARD BENNER,

Defendant.

NO. CR 64-89

FINDINGS AND OPINION

KILKENNY, JUDGE:

Defendant is charged under 26 U.S.C. § 5851 with knowingly willfully unlawfully and feloniously possessing a sawed off firearm in violation of 26 U.S.C. § 5821. The facts are not in dispute. Defendant's only defense is that § 5851 as applied to § 5821, violates his Fifth Amendment rights against self-incrimination. He relies on the recent cases of Marchetti v. United States, 390 U.S. 39 (1968), Crosso v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968). In my view, those cases are distinguishable.

Under the provisions of 26 U.S.C. § 5821, it is obligatory on any person who wishes to make a firearm, whether by manufacture or alteration, to declare his intention to the Secretary of the Treasury and provide his fingerprints and photograph prior to the making. Moreover, such person must pay a tax of \$200.00 on each firearm so made. Section 5851 declares it unlawful for any person to possess or receive a firearm made in violation of § 5821.

The decision in Haynes is restricted to a declaration that § 5851, making it unlawful for any person to possess a firearm, and registered under § 5841, violated the Fifth Amendment. Clearly, in order to register the gun under § 5841, the person had to admit that he possessed it unlawfully. Here, defendant is not charged with failure to register his gun. He is charged with a violation of a separate provision of § 5851, making it unlawful to receive or possess an illegally made firearm. Decision on this point was expressly reserved in Haynes, 390 U. S. 91. The decisions in Marchetti and Grosso, in my opinion, have no application to the admitted facts in this case.

There, the taxpayers were, in effect, required by the applicable statute to declare that they were engaged in illegal activities. Here, as previously mentioned, defendant is only charged with the act of possessing an unlawfully made gun. Nowhere, does the statute require him to make a declaration which would be incriminatory in nature.

I find that on or about February 3, 1968, in the District of Oregon, that defendant did knowingly, willfully, unlawfully and feloniously possess a firearm, to-wit: a Savage .22 Magnum Rim Fire rifle with 7-1/2 inch barreil, overall length 17-3/4 inches, butt sawed off to pistol grip, no serial number, which had been made in violation of Title 26, § 5821, United States Code; in violation of Title 26, § 5851, United States Code, and that defendant is guilty of the crime as charged in the information.

The foregoing shall serve as my findings and conclusions. The matter is referred to the Probation Department for a pre-sentence report and placed on my sentencing calendar for June 26, 1968, at 10:30 A.M., at

which time defendant and his attorney shall appear.

DATED this 5th day of June, 1968

John F. Kilkenny
District Judge

(Received in final form 1 July 1993)

THE POLYMER LETTERS VOL. 1, PP. 1-100

and the only decision that has to be made is whether to make a firm or a flexible contract. \square

City or town, State, Zip code)

ALCOHOL AND TOBACCO TAX DIVISION, NATIONAL REVENUE SERVICE, WASHINGTON, D. C. 20544

ND ADDRESS OF EXECUTIVE OFFICER IF APPLICANT IS OTHER THAN AN INDIVIDUAL

YOU CAN COME
OF A FELONY?

YES

110

or FIREARMS (Machine gun, submachine gun, shotgun or rifle, rocket or silencer, etc.)

H OR BARREL (Punches)

7. MODEL

B. CALIBER OF GUN:

9. SERIAL NUMBER

MARKS OF IDENTIFICATION

11. NAME AND LOCATION OF ORIGINAL MANUFACTURER OF THE ARM (If foreign, furnish plans and specifications)

IS YOUR OBJECT IN SEEKING TO MAKE THE FINEST FILM?

declare under the penalties of perjury that the foregoing is being made for a lawful purpose and that the responses given in responses to questions 3 to 12 inclusive are, to the best of my knowledge and belief, true, correct, and complete.

URE OF DECLARANT

14. TITLE OR STATUS (Indicate number of times, if more than one, ration, give title)

on called for in Items 18 thru 20 on reverse of this form must be furnished, unless declarant is other than an individual.

DO NOT WRITE IN THIS SPACE

DECLARATION OF INTENT TO MAKE THE FIREARM DESIGNATED HIDDEN HAS BEEN EXAMINED AND THE MAKER OF THE
SM IS

APPROVED ☒ DISAPPROVED FOR THE FOLLOWING REASON.

17. SIGNATURE (Director, Alcohol or Tobacco Tax Division)

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

STATUTES (UNITED STATES CODE, TITLE 26)

§ 5821. Rate, exceptions, etc.

(a) Rate.--There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of \$200 for each firearm so made.

(b) Exceptions.--The tax imposed by subsection (a) shall not apply to the making of a firearm--

(1) by any person who is engaged within the United States in the business of manufacturing firearms;

(2) from another firearm with respect to which a tax had been paid, prior to such making, under subsection (a) of this section; or

(3) for the use of--

(A) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or

(B) any peace officer or any Federal officer designated by regulations of the Secretary or his delegate.

Any person who makes a firearm in respect of which tax imposed by subsection (a) does not apply by reason of the preceding sentence shall

make such report in respect thereof as the Secretary or his delegate may by regulation prescribe.

(c) By whom paid; when paid.--The tax imposed by subsection (a) shall be paid by the person making the firearm. Such tax shall be paid in advance of the making of the firearm.

(d) How paid.--Payment of the tax imposed by subsection (a) shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

(e) Declaration.--It shall be unlawful for any person subject to the tax imposed by subsection (a) to make a firearm unless, prior to such making, he has declared in writing his intention to make a firearm, has affixed the stamp described in subsection (d) to the original of such declaration, and has filed such original and a copy thereof. The declaration required by the preceding sentence shall be filed at such place, and shall be in such form and contain such information, as the Secretary or his delegate may by regulations prescribe. The original of the declaration, with the stamp affixed, shall be returned to the person making the declaration. If the person making the declaration is an individual, there shall be included as part of the declaration the fingerprints and a photograph of such individual.

§ 5841. Registration of persons in general

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together

with his his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is not a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

§ 5851. Possessing firearms illegally

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

§ 5861. Penalties

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than

\$2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court.

§ 6107. List of special taxpayers for public inspection

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E with respect to a trade or business carried on within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

REGULATIONS (CODE OF FEDERAL REGULATIONS, TITLE 26, CHAPTER 1)

§ 179.77 Written declaration.

Except as provided in §§ 179.82, 179.83, and 179.84 every person intending to make a firearm must declare his intention in writing on Form 1A (Firearms) to make such firearm. The declaration shall show (a) the name and address of the maker, and, if the maker is other than a natural person, the name and address of the principal officer or

authorized representative thereof; (b) the serial number, caliber, length of barrel, trade name, and other marks identifying the firearm; and (c) such additional information as may be required on Form 1A (hereinafter). A "National Firearms Act" stamp (see § 179.75) must be affixed to the original declaration in the space provided therefor, and properly canceled (see § 179.81). Form 1A (Firearms) and appropriate tax stamp may be obtained from any District Director of Internal Revenue.

§ 179.78 Identification of declarant.

If the declarant is an individual, he shall attach to each copy of the declaration an individual photograph of himself, taken within one year prior to the date of such declaration, and shall affix his fingerprints to such declaration. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The declaration must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the declaration are those of the declarant and that the firearm is intended by such person for lawful purposes.

§ 179.79 Procedure for approval of declaration.

The declaration of intent, to make a firearm, Form 1A (Firearms), must be forwarded directly, in duplicate, by the maker of the firearm to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C. The Director, Alcohol and Tobacco Tax Division, will consider the application for approval or disapproval. If the application is approved, the Director, Alcohol and Tobacco Tax Division, will return the original thereof to the maker of the firearm and retain the duplicate. Upon receipt of the approved declaration, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the declaration, satisfactorily executed, with the "National Firearms Act" stamp attached, has been forwarded to the Director, Alcohol and Tobacco Tax Division, and has been approved and returned by him. If the application is disapproved, the original Form 1A (Firearms) with the "National Firearms Act" stamp attached thereto will be returned to the maker with the reasons for disapproval stated on the form.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER EDWARD BRILEY, JR.,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

No. 20454

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
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FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER EDWARD BRILEY, JR.,)	
)	
Appellant,)	
)	
vs.)	No. 20454
)	
LAWRENCE E. WILSON, Warden,)	
California State Prison,)	
San Quentin, California,)	
)	
Appellee.)	
)	

APPELLEE'S BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus in the proceeding entitled Briley v. Wilson, No. 43331, was issued April 27, 1965 (R. 27). Appellant's application for a certificate of probable cause and motion for leave to appeal in forma pauperis were filed May 12, 1965 (R.28). At this same time, in addition to an affidavit showing appellant was without funds necessary to prosecute the appeal (R. 29), appellant also filed points and authorities in support of his application for certificate of probable cause (R. 30-33). The District Court certified that there was probable cause for the appeal and

On August 12, 1965, granted appellant's motion for leave to appeal in forma pauperis (R. 34-35). Appellant invokes the jurisdiction of this court pursuant to 28 United States Code 2253.

STATEMENT OF THE CASE

This brief represents the initial appearance in this matter of the California Attorney General on behalf of appellee and respondent, Lawrence E. Wilson. Appellee filed no pleadings in the court below.

Appellant was convicted on May 22, 1959, in the Superior Court for Los Angeles County, after a plea of guilty, of one count of second degree murder in violation of California Penal Code section 187 (R. 2). No appeal was taken from the conviction.

A petition for a writ of habeas corpus was filed in the Superior Court for Marin County and denied on October 29, 1964 (R. 6). A like petition for habeas corpus was thereafter filed in the California Supreme Court and was denied on February 10, 1965 (R. 6).

Appellant is presently imprisoned in the California State Prison at San Quentin and is serving an indeterminate sentence of from five years to life (R. 2).

STATEMENT OF THE FACTS

The record before the District Court consisted only of appellant's petition. This petition contained the

following allegations:

1. Because petitioner was initially arrested and searched on a burglary charge, it was improper to later charge him with murder.

2. Evidence secured from petitioner's home, car, person, and thoughts (by a lie detector examination), was obtained through illegal searches and seizures.

3. The interrogating officers violated his constitutional rights because they failed to advise him of his right to counsel and his right to remain silent before he made incriminating statements.

4. The trial court was without jurisdiction to try defendant because the public defender, over petitioner's objections, waived the time limit within which the preliminary hearing must be held.

5. Although both the prosecution and defense stipulated that the coroner's report was admissible into evidence, nevertheless, the trial court erred in allowing its admission because appellant was not fully advised of his right of waiver of stipulated testimony
(R. 18).

SUMMARY OF APPELLEE'S ARGUMENT

I. The petition did not state facts entitling appellant to relief in the District Court.

ARGUMENT

Where the District Court has dismissed a petition without the issuance of an order to show cause, the question on appeal becomes whether, assuming the allegations of the petitions to be true, a violation of some federal constitutional guarantee has been shown. Boyden v. Webb, 208 F.2d 201, 203 (9th Cir. 1953).

The petition must allege primary facts which show that the state prosecution departed from constitutional requirements. Schlette v. People, 284 F.2d 827, 831-832 (9th Cir. 1960), cert. denied, 366 U.S. 940 (1961). Mere conclusory statements, without factual support, are insufficient. Facts must be set out "with particularity and in detail in a petition for the writ." Linden v. Dickson, 278 F.2d 755, 757 (9th Cir. 1960).

Where the petition states that appellant was represented by counsel at the time of the preliminary hearing and at the time he entered a plea of guilty, and there is no specific allegation that the said plea of guilty was illegally induced, the petition for habeas corpus should be summarily denied. This must follow because a plea of guilty, entered upon advice of counsel, by its very nature forecloses the consideration of any errors which may have occurred prior thereto. Thus, neither the alleged

procedural errors nor the illegally secured evidence have contributed to appellant's conviction; his conviction was based solely upon his plea of guilty. Thompson v. Burke, 334 U.S. 736 (1948); Hardee v. Wilson, 363 F.2d 848 (9th Cir. 1966); Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965); McGrath v. LaVallee, 348 F.2d 373 (2d Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651 (1964). In the Harris case, this Court quoted with approval from Thomas v. United States, 290 F.2d 696, 697 (9th Cir. 1961):

"By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his objection to its introduction, if made and overruled by the trial court, could have been raised on appeal.

Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. Eberhart v. United States, 9 Cir., 1958, 262 F.2d 421 * * * The conviction and sentence which follow a plea of guilty are based solely

and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. United States v. French, 7 Cir., 1960, 274 F. 2d 297; United States v. Sturm, 7 Cir., 1950, 180 F.2d 413; Kinney v. United States 10 Cir., 1949, 177 F.2d 895.'" Harris v. United States, supra at 80.

Of course, where the petitioner specifically alleges that the plea of guilty was directly induced by the constitutional errors allegedly committed, then the District Court should not dismiss the petition for failure to state adequate grounds for habeas corpus relief. Cf. Johnson v. Wilson, ____ F.2d ____ (9th Cir. 1967); Gladden v. Holland, 366 F.2d 580 (9th Cir. 1966). But these are clearly not the facts of the instant case. Appellant made no allegation that his plea of guilty was coerced or otherwise illegally induced. On review, the question is whether the District Court acted properly in denying the application then before it. Therefore, on the basis of the above authority, appellant should not now be heard on issues which he himself has foreclosed consideration of.

CONCLUSION

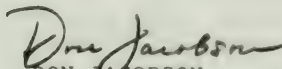
For the aforementioned reasons, it is respectfully submitted that the order of the District Court denying

appellant's petition for writ of habeas corpus should be affirmed.

DATED: February 17, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



DON JACOBSON
Deputy Attorney General

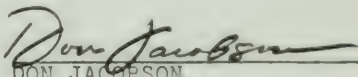
Attorneys for Appellee

DJ:cmw
CR SF
65-304

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: February 17, 1967

A handwritten signature in cursive script, reading "Don Jacobson", written over a horizontal line.

DON JACOBSON
Deputy Attorney General
of the State of California

FEB 20 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Appellants

v.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

BAREFOOT SANDERS,
Assistant Attorney General,

JOHN K. VAN de KAMP,
United States Attorney,

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Washington, D. C. 20530.

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AX WILFAND,
Assistant General Counsel,
Federal Home Loan Bank Board.

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20378

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

SIDNEY ELLIOTT, ET AL.,
Appellees

No. 20447

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

SIDNEY ELLIOTT, ET AL.,
Appellees

No. 20522

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

EQUITABLE SAVINGS & LOAN ASSOCIATION, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

The appellees' 192 page brief would seem, on its face, to require a lengthy reply brief. However, once the reckless and repetitious hyperbole has been put to one side there is not much left for comment. Appellees apparently have decided to make it appear that an autocratic and vindictive federal agency in far off Washington has been hounding an innocent California savings and loan association for twenty years, and is still continuing its persecution, even though the association has merged with a state savings and loan stock company, and is no longer in effective existence.

It is true that the Federal Home Loan Bank Board has on three occasions preferred charges of mismanagement against Long Beach and that on two of those occasions, in 1946 and 1960, it took over Long Beach's management. But although the upper courts frequently reverse the rulings of Judge Hall in the litigation which followed the Board's action,^{1/} success at the appellate levels did not bring the charges of mismanagement to issue, and in February 1962 the Board entered into a Settlement Agreement, which compromised the many differences then existing between the Board and Long Beach and which set forth a Board approved plan for the liquidation of Long Beach. And this is the

^{1/} See Ex parte Fahey, 332 U.S. 258 (1947); Home Loan Bank Board v. Mallonee, 196 F. 2d 336 (1952), cert. den. 345 U.S. 952; Fahey v. O'Melvenny and Myers, 200 F. 2d 420 (1952), cert. den. 345 U.S. 952; Fahey v. Calverley, 208 F. 2d 197 (1953), cert. den. 347 U.S. 955; Federal Home Loan Bank Board v. Hall, 225 F. 2d 349 (1955), cert. den. 350 U.S. 968; Ammann v. Home Investment Co., 243 F. 2d 748 (1957).

initial date from which the instant controversy flows. All references to preceding events (and particularly to the fanciful twenty years of persecution) are irrelevant.

Apparently for fiscal reasons Long Beach, as it had a right to do, abandoned its plan of liquidation as set forth in the Settlement Agreement, and in May 1962 proposed an outright merger with Equitable. Long Beach recognized that the proposed merger would require approval of both the Board and the California Savings and Loan Commissioner, and initially submitted the proposal to the Board. In the meantime, the Board had discovered that friends of management (both Long Beach and Equitable) had poured millions of dollars, much of it borrowed, into Long Beach, in the obvious expectation of participating in the distribution of the Long Beach's large net worth. The Board believed that Long Beach had not been fair to the regular Long Beach depositors in permitting this influx, and advised Long Beach that a merger agreement which would permit these late and heavy depositors to share pro rata in the distribution would not meet with Board approval. Whereupon Long Beach revised its merger proposal to meet the Board's views, and, as revised, the merger agreement was executed by Long Beach and Equitable on June 12, 1963 and thereafter approved by Long Beach members and Equitable stockholders and by the federal and state supervisory agencies. The merger took place on September 10, 1963, and once consummated these actions were filed to have the distribution provisions of the merger agreement declared invalid, and pro rata distribution ordered.

In this short reply brief the appellants will endeavor to summarize the court rulings, the appellants' bases for exception, the appellees' response to appellants' argument, and such new matter as appellants may deem appropriate in view of appellees' response.

At the outset it should be noted that, despite appellees' inferences to the contrary, the District Court ruled that there were no factual issues involved, and that its decision was based entirely upon certain legal conclusions. In view of this determination, appellants will not dwell on the numerous allegations of fact made by appellees, which are either in error or irrelevant,^{2/} but will confine themselves to the legal issues confronting this Court.

In this reply brief appellants will touch briefly on the following basic issues: I -- The Power of the District Court to Revise the Merger Agreement, II -- Appellees' Remedy as Affected by Laches, and III -- The Legality of the Merger Provisions.

I

The Power of the Court to Alter the Terms of the Merger

The District Court ruled that it had the power to order distribution of the Equitable stock on a pro rata basis. Judge Hall declared that the merger was consummated under 12 U.S.C. 1464(i), and that this provision required pro rata distribution. This

^{2/} See Appendix hereto for comment on some of appellees' most flagrant departures from fact.

section prescribes the procedures in the event of a conversion. A conversion is the transformation of a federal association into a state association, or vice versa. A conversion involves only one association. A merger involves two associations not one. A conversion is not a merger. (See Appellants' Brief, pp. 25-27.) Even Long Beach during the course of the proceedings below never suggested that the merger was being consummated under 12 U.S.C. 1464(i). This was a contribution of the trial judge, and was patently in error. As we have pointed out (Appellants' Brief, pp. 27-29) all parties acted upon the assumption that the merger, insofar as federal law was concerned, was being processed under 12 U.S.C. 1464(d)(2) (as it read before being amended in 1966 -- P.L. 89-695 of October 16, 1966)^{3/} and 12 C.F.R. 546.4^{4/} which do not specify pro rata distribution in the event of merger. But 12 C.F.R. 546.4 does require Board approval of the merger.

The appellees made no effort to reply to the appellants' contentions, but simply assumed, without any analysis whatsoever, that 12 U.S.C. 1464(i) required pro rata distribution of net worth in

3/ Section 5(d)(2), as it reads now, still contains substantially the same provision with respect to mergers as the former statute. Because of the saving clause in Section 101(b) of P.L. 89-695, however, these appeals are still governed by the statute as it read prior to its recent amendment.

4/ Since filing its opening brief, the Board has promulgated an explicit regulation dealing with a merger of a Federal association into a state-chartered institution. Under this newly promulgated regulation, Board approval is necessary. See 31 F.R. 15235, dated December 6, 1966; corrected in 31 F.R. 155691, dated December 10, 1966.

this instance. (See Appellees' Brief, pp. 42, 63, 85, 88-89, 90, 91, 92, 115, 140-141.) They attempted to gloss over the fact that the statute relates to conversion, not merger, by referring to the merger here, as a "conversion by merger", whatever that may mean. (Appellees' Brief, p. 47.) Nor did the appellees respond to the appellants' contention that Board approval of the merger was required under 12 C.F.R. 546.4.

Manifestly, in 12 U.S.C. 1464(d)(2) the Congress delegated to the Board, and not to the courts, the power to regulate mergers of federal savings and loan associations. The Court, by reforming the Merger Agreement to substitute pro rata distribution for the distribution formula contractually agreed upon and approved by the Board, assumed the regulatory power of the Board. Of the many errors which we believe the lower court committed in its decision, this attempted seizure of administrative power seems the most egregious. (See Appellants' Brief, pp. 25-31.)

The District Court then attempted to support its exercise of administrative power by stating that the provision in the Merger Agreement giving shareholders the right to judicially contest the merger, if anyone so desired, was, in effect, a consent by the Board to disposition of the controversy by the Court. How the statement of shareholders' existing rights could constitute an abandonment by the Board of its regulatory responsibility neither the District Court nor appellees pointed out. (See Appellants' Brief, pp. 31-33.) The District Court also attempted to justify its action by concluding that it was merely enforcing the contractual agreement of the parties

as set forth in the Settlement Agreement. As appellants pointed out (Appellants' Brief, pp. 33-37), the liquidation plan in the Settlement Agreement was far different from the Merger Agreement now before this Court.

Although it seems evident to appellants that the power of the District Court to assume regulatory functions is probably the primary issue in these appeals, and although appellants endeavored to cite the relevant authorities (Appellants' Brief, pp. 30-31), expecting to join issue with appellees on this point, appellees again avoided such joinder, and failed to comment upon any of the cited cases.^{5/}

II

Appellees' Remedy as Affected by Laches

The District Court did not comment on the appellants' contention (pp. 37-39) that the only available remedy to the then

5/ The appellees did mention S.E.C. v. Chenery (318 U.S. 80) but in a different context (Appellees' Brief, p. 99). In that case S.E.C. approved a plan of reorganization of a holding company which would prevent officers and directors who bought stock while the reorganization plan was being considered from converting this stock into stock in the new company. Under the plan the stock was to be surrendered to the company at cost plus interest. The Commission found that the officers and directors were not guilty of any wrongdoing. The Supreme Court declared that there was no justification for the provisions requiring the officers and directors to turn back their stock at least insofar as the record disclosed, and remanded to the Court of Appeals with direction to remand to the agency for action consistent with the opinion.

6/

plaintiffs was to have the merger set aside; or their argument that this remedy was barred by laches (pp. 39-43), in that under the circumstances the parties should have resolved the issue before consummating the merger.

The appellees have not undertaken to respond to appellants' arguments or authorities, merely stating that litigation was contemplated and that suit was commenced promptly upon consummation of the merger (Appellees' Brief, p. 146). The appellees' statements are factual but hardly a satisfactory reply. In an equitable proceeding there are equities to be balanced, and it is evident that in this case the unscrambling of the two associations would be a monumental task, if not entirely impossible (see Appellants' Brief, pp. 39-43) which could have been avoided by an appropriate action for injunctive relief prior to consummation of the merger.

III

The Legality of the Merger Provision

The question of the validity of the contested merger provisions need not be reached if this Court should find that the District Court had no power to reform the merger, and that appellees' sole remedy (setting aside the merger) was barred by laches.

With respect to legality the District Court based its decision largely upon a legal conclusion that the (a) law, (b) the charter of

6/ There does not appear to be any remedy available to appellees short of having the merger set aside. A new merger agreement incorporating pro rata distribution even if acceptable to the Board and the California Commissioner, could not be voted on by Long Beach or its shareholders, since Long Beach is now an empty shell, without any membership, and without any business.

Long Beach, and (c) the Settlement Agreement required distribution of the surplus on a pro rata basis, and that, accordingly, contrary or inconsistent merger provisions were invalid.

The Ruling Re Statutory Power

The Court's ruling that under 12 U.S.C. 1464(i) pro rata distribution was required has already been the subject of comment herein. That statute was inapplicable.

The "Mutual" Ruling

Judge Hall also ruled that since Long Beach was a "mutual" association distribution of any surplus had to be pro rata, citing two cases which are concerned with insolvent companies.^{7/}

The question is not whether shareholders in a mutual association are entitled to equal treatment. The question is whether the Association, with approval of the supervisory agency, has the right, upon distribution of net worth, to disqualify certain shareholders because their shares were purchased because of "inside" information, or for other equitable reasons. The corollary question is whether under all circumstances a supervisory agency must approve a pro rata distribution provision, regardless of equities. (See Appellants' Brief, pp. 44-49.)

Under the District Court's rigid and inflexible rule, the management of Long Beach, or of any mutual institution, could with knowledge of an impending liquidation or merger with a stock institution borrow millions of dollars to deposit in the mutual for

^{7/} These cases are covered in footnote 8 herein.

a temporary period solely for the purpose of participating in the distribution of the institution's net worth. Again, management could sit idly by and permit its friends and acquaintances do the same thing. Yet the District Court would have us believe that the law is powerless to prevent such a result simply because the institution was a mutual and notwithstanding the obvious breach by management of its fiduciary duty to its savers.

Appellees talk at considerable length about mutuality (Appellees' Brief, pp. 45-57), but do not cite any authorities for the ruling that mutual savings and loan association shareholders must by law share, and share alike in the event of merger. The cases cited are irrelevant.^{8/} Those that even appear remotely to bear upon the problem concern distribution after insolvency.

8/ The only cases which seem to bear on the question were:

Huntington v. Nat. Savings Bank, 96 U.S. 388, in which the question was whether persons starting a national bank (but ~~who~~ did not hold stock or make any investment) were entitled to the profits rather than the depositors. The Court ruled in favor of the depositors, since charter references indicated the bank was to be operated for their benefit.

Intermountain B & L Assoc. v. Gallegos, 78 F. 2d 972 (C.A. 9, 1935) in which a question arose as to whether, in the face of insolvency, Installment Certificate holders were creditors or shareholders. The Court ruled that under the circumstances they were creditors.

Pacific Coast Sav. Soc. v. Sturdivant, 165 Cal. 687 (1913) also involved the question as to whether a certain class of shareholders had become creditors of an insolvent B & L association.

In Wood v. Hamaguchi, 207 Cal. 79 (1929) the principal question was whether a statute authorizing the state superintendent of banks to levy assessments against shareholders of insolvent banks was constitutional.

Naturally, in such a case pro rata distribution of any remainder is equitable since the dollar lost is lost whether it was invested the day before insolvency or the year before. But where the distribution is of net worth then pro rata distribution can be extremely inequitable, as in this case. The two cases most in point, In Re Cleveland and In Re Springfield held that pro rata distribution did not have to be followed. (See Appellants' Brief, pp. 59-65.) Appellees' belabored effort to distinguish those cases on the facts (pp. 148-152) by their distorted version of alleged undisputed facts present in the instant cases (some of which are noted in the Appendix) bespeaks the weakness of their position.

Regardless of any factual distinctions the cases stand for the proposition that there is no legal requirement that in a mutual association pro rata distribution of net worth to shareholders as of a given date is mandatory.

The Ruling Re Board Regulations

The Court held that under Board regulations (12 C.F.R. 563.3) an association cannot create a preference unless it is spelled out in certain instruments such as the passbooks, certificates of deposit etc., and further held that since no such preferences were noted any preference would be invalid. Appellants concede that these passbook regulations are designed to prevent preferences; and we likewise concede that under normal circumstances preferences in distribution of net worth, upon liquidation of a federal savings and loan association, would be invalid for any number of reasons. But here we are

dealing with the right of an association or of shareholders or of the Board to prevent inequity -- when, as here, management has permitted a situation to arise which will unjustly enrich some insiders at the expense of the regular shareholders. Under such circumstances equity does not permit regulations, designed to protect shareholders, to be used as a weapon against them.^{9/}

The appellees naturally adopt the District Court's point of view (Appellees' Brief, pp. 58-61) and argue that regulations have the force and effect of law -- a hornbook principle which appellants will not contest. The cases cited, however, are not apropos here. Both Service v. Dulles and United States v. Shaughnessy related to administrative failure to follow prescribed regulations in removing an employee from office, and in removing an alien from the country. These procedures for removal were expressly designed to afford protection to the employee and to the alien. These cases are not relevant to the issue of whether passbook regulations can be used to prevent the regular shareholders from getting their rightful share of the net worth upon merger.

The Ruling Re the Charter Provisions

The Court ruled that the merger provisions were invalid, declaring that the charter provisions requiring pro rata distribution

^{9/} Let it be clearly understood that we do not contend that the attempt on the part of these newcomers to make a quick profit was criminal or fraudulent. Our criticism is directed against management which took no action to protect its bona fide shareholders. And the Board's action was designed to protect, not penalize, the bona fide shareholders.

of surplus in the event of a "liquidation, dissolution or winding up" of corporate affairs could not be waived or modified by the association, the Board or the court.

The appellants contend that the merger undertaken in this instance was not a "liquidation, dissolution or winding up" of corporate affairs, such as was contemplated by the charter provision. (See Appellants' Brief, pp. 44-48.) In support of this position the appellants cited a number of authorities (Appellants' Brief, p. 47).

The appellants further pointed out that even if there were a conflict between the charter and the merger agreement, the merger agreement would prevail, if its terms were fair (Appellants' Brief, pp. 48-50). This Court's attention is called to the significant fact that not one of the leading cases pertaining to the interpretation of a charter provisions providing for distribution of assets upon "liquidation, dissolution or winding up" of a corporate business, and not one of the cases supporting the principle that merger terms prevail over charter rights if the test of fairness is met, is either noted or commented upon by the District Court in its lengthy opinion, or noted or commented upon by appellees in their 192 page brief. Silence on these basic issues is not, we submit, a very compelling refutation.

The Settlement Agreement

The District Court held that the Settlement Agreement provided for pro rata distribution -- that Long Beach relied on the Agreement,

and that the Board is estopped to take a different position. As we have already pointed out, Long Beach elected not to liquidate in the manner provided in the Agreement, and went to the Board for approval of the merger, as required. The Court's ruling is without any merit.

Conclusion

The District Court has improperly undertaken to assume the power of a regulatory agency. The order reforming the Merger Agreement by requiring pro rata distribution was beyond the Court's power, and for that reason alone the judgment should be reversed. The only relief available to appellees was an order setting aside the merger, but since this relief is barred by laches, a mandate should issue directing the District Court to dismiss the Complaints.

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FEBRUARY 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


CARL EARDLEY
Attorney, Department of Justice

APPENDIX

The Factual Representations of Appellees Re Creation of Surplus

The main thrust of appellees' brief is founded on unsupported allegations concerning the effect of the new money upon the surplus of Long Beach. The chief contention is that the new money created the surplus. Appellees allege (Brief, pp. 2, 5, 10, 13, 14) that all except \$842,000 of the \$9.5 million in Equitable stock was created by the \$42 million of new money flowing into Long Beach in the period April-December, 1962, and that the shareholders investing the \$42 million have been penalized by the contested merger provisions. The facts are:

Re Creation of Surplus By New Money

The \$42 million in added savings were not all "penalized" by the distribution terms of the Merger Agreement. Long Beach's own proxy statement (Exh. E, p. 5) recites that only \$19 million were adversely affected. Appellees do not disclose the basis of their \$842,000 figure, but that it is manifestly incorrect is evident from Long Beach's proxy statement. According to that statement (Exh. E, p. 22), Long Beach's book net worth at the end of calendar year 1961 (before the \$42 million were deposited in Long Beach) amounted to \$7,232,338. At the end of the following calendar year (after the \$42 million had been added), its book net worth amounted to \$7,625,331, an increase of \$392,993 over the prior year. How one could assert that only \$842,000 was available for distribution but for the added \$42 million in the face of these figures, supplied by Long Beach, we cannot comprehend.

Re Good Will

Appellees allege repeatedly that the new money created good will in the amount of \$3 million (Brief, p. 16). There is no factual support for this argumentative conclusion. On the contrary the record rebuts the allegation. The report of Standard Research Consultants, retained to evaluate Long Beach's net worth and to arrive at a fair exchange basis of such net worth for Equitable stock (Exh. J, p. 11) reads, in part, "A valuation of \$9,250,000-\$9,500,000 for Long Beach represents a ratio of market value to book value (as stated on the December 31, 1962 statement of condition) of 122%-126%. This is in line with the ratios at which investors are currently appraising stated book values of the comparative companies. Because of its operating history, Long Beach's ratio would be on the low side."

If we apply this formula to Long Beach's net worth as of December 31, 1961 (before the addition of the new accounts) Long

Beach's market value, based on its then book value of \$7,232,338, and applying the lower range of 122%, was \$8,823,452. As of December 31, 1962 its market value was \$9,302,903. Thus the alleged \$3 million added "good will" figure is seen to be closer to \$480,000. And even this \$480,000 could not possibly be attributable exclusively to the \$19 million. For in this connection the report specifically noted with respect to the sharp increase in Long Beach accounts (Exh. J, pp. 6, 7), "It is anticipated that between \$10,000,000-\$11,000,000 will be withdrawn after the proposed merger situation has been resolved," an obvious recognition that this was "free-rider" money.

The Tax Saving

The appellants contend that as a result of the new money there was a "possible" tax saving of \$3,884,000 (Brief, p. 17). This is a pure speculation, without any factual support.

Appellees point to the \$3 million premium and the almost \$2 million in accrued interest paid by the Insurance Corporation on the loans it acquired pursuant to the Settlement Agreement in compromise of its \$45 million claim against Long Beach. Appellees label this amount of close to \$5 million as net taxable income. It is true that under the former federal tax law (26 U.S.C. 593) such income was tax-free if it was transferred within, or as soon as practicable at the close of, the taxable calendar year (1962) to a bad debt reserve account, provided that the tax-free amount could not be greater than the amount by which 12% of its savings at the end of the calendar year (1962) exceeded the sum of its surplus, undivided profits and reserves at the beginning of the taxable calendar year (1962). The first answer to the conclusory assertion that there was a \$3,884,000 1/ tax saving is that none of Long Beach's income for the 1962 calendar year was transferred to a bad debt reserve account. Long Beach's own proxy statement (Exh. E, p. 22) shows that its reserves for the year 1962 decreased rather than increased. Second, the \$5 million was not net taxable income. Appellees admit (Brief, p. 28) that Long Beach had a \$1 million operating loss during 1962. Its nonrecurring income for that year (Exh. E, pp. 22, 23, note 3), after taking into account the \$5 million resulting from the Settlement Agreement and the extraordinary expenses attributable thereto, amounted to \$1,893,161. Thus at best, after deducting Long Beach's operating loss of \$1 million, its net taxable income for 1962 could only have come to \$893,161. Third, the tax shelter was not an automatic 12% of savings, as appellees constantly state. It was, at most, the difference between 12% of savings at the end of the taxable 1962 calendar year and the sum of Long Beach's surplus and undivided

1/ How this figure is computed is never explained.

profits at the beginning of 1962. According to Long Beach's own figures (Exh. E, p. 22) the latter sum was \$7,232,338. Thus, there could be no tax shelter for income earned in the 1962 calendar year based upon additional savings until the savings capital reached \$60 million. Finally, of course, Long Beach's own proxy statement (Exh. E, p. 22) shows no federal tax liability for the year 1962; indeed it does not even refer to a contingent liability with respect to the \$5 million in its specific discussion of income taxes (Exh. E, p. 34). This alleged tax saving was never once mentioned in the lengthy negotiations between the Board and Long Beach prior to the consummation of the merger (Exhs. C-1 - C-72). It is an obvious afterthought, developed in an effort to justify management's failure to observe its elementary fiduciary responsibilities.

The \$3 Million Saving

Appellees also attribute a \$3 million saving to the new money because under the Settlement Agreement's liquidation plan Long Beach would have had to withhold from distribution \$3 million for ten years. (Brief, pp. 17, 20.) They go on to say that the \$42 million (or should it be the \$19 million) of money led to the adoption of the Merger Agreement which had no provision for the withholding of \$3 million. Therefore, they argue, the new money saved \$3 million. This is an obvious non-sequitur, and not worthy of a response.

With regard to the contention that without the new money there would have been no merger the record discloses that as part of the Long Beach liquidation plan set forth in the Settlement Agreement Equitable planned to assume liability for all of Long Beach's savings accounts in exchange for an equal amount of Long Beach assets. This occurred in February 1962, long before any of the speculative deposits came into Long Beach.

Other Misstatements of Fact

Re the alleged forfeiture.

Appellees persistently repeat that the distribution provisions of the Merger Agreement constituted a forfeiture by the Board of the savings accounts affected by such provisions. This is nonsense. The individuals received the normal dividends, and were able to withdraw their savings. They simply lost the windfall they expected to receive by virtue of the distribution of Long Beach's net worth.

Re the Lack of a Hearing

The appellees also make it appear that the Board issued an order, without a hearing and without findings, which penalized the

shareholders (pp. 97-105). This is another characteristic attempt to confuse the issues. The fact is that faced with Board disapproval of a merger agreement which sanctioned the siphoning off of a large part of the surplus by the free riders Long Beach prepared a merger agreement which contained the provisions appellees now contest. This agreement was executed by Long Beach, by Equitable, approved by the shareholders of both companies, and then given approval by the supervisory federal and state agencies. So even had the Board imposed forfeitures Long Beach participated in the action, and has no cause for complaint.

Insofar as the lack of hearing and findings is concerned it is clear that there was no occasion for a hearing or findings, since the Board action was a simple approval of a proposed merger. And it should be noted that the adjudicatory provisions of the Administrative Procedure Act are not applicable to the Board's function in reviewing merger applications. Accordingly, the decisional process of that statute (5 U.S.C. 1007) requiring findings and conclusions are not applicable. See Bridgeport Federal Savings and Loan Association v. Federal Home Loan Bank Board, 307 F. 2d 580 (C.A. 3); Federal Home Loan Bank Board v. Rowe, 284 F. 2d 274 (C.A.D.C.); First National Bank v. First Federal Savings and Loan Association, 225 F. 2d 33 (C.A.D.C.).

Re the Small Depositors

Appellees' argument (Brief, pp. 87-95) that the distribution formula in the Merger Agreement affects small depositors more than large is erroneous. This argument is presumably based on its Exhibit 13 which purports to classify, by size, accounts adversely affected by the distribution formula. The information given in that exhibit is misleading. The crucial matter, the dollar amount affected in the various size groupings, is not supplied. The underlying data is contained in Equitable's answers to appellants' interrogatories filed in the Clerk's Office on April 28, 1964, but thereafter lost. Notwithstanding that Rule 56 provides for resort to interrogatories in the consideration of motions for summary judgment this Court ruled, by Order filed September 20, 1966, that a true copy of Equitable's answers to the interrogatories could not be substituted for the lost original, or used on this appeal. In any event, the undisputed statistical data set forth in Appellants' Brief (pp. 54-55) demonstrates that it is the large speculative depositor and not the small depositor who is adversely affected by the distribution formula. (See 3R 1345.)

Appellees also suggest (Brief, p. 65) that when distribution formula was agreed upon the Board had before it the record of every saver whose account was pledged or assigned. This is not so.

What the Board had was the record of accounts which had increased by \$10,000 or more between April 2, 1962 and November 30, 1962 (Exhs. C-29, C-29A). It had no documentation with respect to any other accounts.

This pretended concern of Long Beach for the small shareholders was not manifest in 1962-1963 when the terms of the proposed merger were the subject of discussion between the Board and Long Beach. If the recommendations of the Board would unfairly discriminate against small shareholders then was the time for Long Beach to raise its voice on their behalf. But Long Beach was only protesting the Board's position re the big depositors.

Re Long Beach Insolvency

The appellees point out that in the period from April 2, 1962 through July 31, 1962 withdrawals amounted to \$13 million and that deposits came to \$49 million. But, they say, had there been no new deposits, Long Beach would have lost 44% of its then savings capital (Brief, p. 8) and further "the forced sale sacrifice of assets needed to raise \$13,000,000 in cash (44% of all deposits) to immediately pay withdrawing panicky depositors would have wiped out all surplus, rendered Long Beach Federal insolvent ^{2/} and forced it to close forever." This is, of course, sheer fantasy. First, of course, it is based upon a non-existent hypothesis. There were new deposits, far in excess of \$13 million, which were not adversely affected by the distribution formula of the Merger Agreement. Second, appellees would have this Court believe that the \$13 million of withdrawals constituted part of the \$30.5 million on deposit in Long Beach prior to the return of the association on April 2, 1962. Yet Mr. Gregory himself told the Board that Mr. Louis Boyar and some of his associates had, after the June 30, 1962 dividend, withdrawn about \$10 million of the approximately \$20.5 million that "celebrities of the financial and entertainment world

^{2/} The brief reads (p. 27, lines 2, 3), "The Association, \$47,000,000 in debt, due on demand, with only \$35,000,000 left in savings deposits was obviously insolvent." This statement, made by persons closely connected with a financial institution, is incredible. Merely to recite partial figures from the liability side of a balance sheet to show insolvency without regard to the other liabilities and without mentioning assets is irresponsible.

widely known for their great wealth and business accumen" had invested in Long Beach on and after April 2, 1962 (3R 1000, 1139, 1376; Exhs. C-5, C-6, C-15). These "celebrities of the financial and entertainment world widely known for their great wealth and business accumen" are the "panicky" depositors for whom appellees are so solicitous. 3/

Re Mr. McMurray

The reference in Appellees' Brief (pp. 61-63) to Mr. McMurray testimony before a congressional committee that all depositors in a mutual institution are treated alike is taken out of context. For the complete discussion of the Long Beach situation, see pp. 30-59, 66-81, 82-86, 116-117, 119-120, 142-163, 433-434, 476-487 of Exh. 22, 3R 1343-1344.

Re The Board Change of Position

Nor is it correct for appellees to suggest (Brief, p. 64) that the Board originally recommended a distribution formula which affected accounts in excess of \$100,000 and then changed its mind. An attempt was made in the summer of 1962 to reach a compromise on the basis of such accounts, but that effort failed and the Board's position was set forth in its letter of May 23, 1963 to Long Beach (3R 1380; Exhs. C-12, C-23, C-35, C-39, C-41, C-43).

3/ We do not know the identity of those who withdrew the other \$3 million. But, it should be noted that every financial institution has withdrawals in the normal course of its business operations, particularly after a dividend period.

No. 20510 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AEROTEC INDUSTRIES OF CALIFORNIA, *et al.*,

Appellants,

vs.

PACIFIC SCIENTIFIC COMPANY,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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No. 20510

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

AEROTEC INDUSTRIES OF CALIFORNIA, *et al.*,

Appellants,

vs.

PACIFIC SCIENTIFIC COMPANY,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

Appellee respectfully requests the Court to grant a rehearing because the decision does not conform to long lines of authorities in three respects.

I.

The Decision Conflicts With a Long Line of Authorities Because It Finds That the Invention Is Anticipated, Based on an Interpretation of the Invention Which Is of Broader Scope Than the Claims of the Patents.

The decision states (p. 12) if the trolley catcher reels had been designed later than the inventions in suit, the claims in suit would read directly on the trolley catchers. Hence, the trolley catchers anticipate.

This gives the claims a court-imposed scope which is broader than the express language of the claims, broader than the patentee asserted before the Patent Office and the District Court, and broader than the express findings of the District Court. It is impossible to read the express language of claim 7 of Pfankuch, for example, on any trolley catcher. "But the Courts have no right to enlarge a patent beyond the scope of its claim" *McClain v. Ortmyer* 141 U.S. 419 (1891). *United States v. Adams* 383 U.S. 39 (1966). *Keating v. Stearnes Imperial Co.* 347 F. 2d 444 (7th Cir. 1965). *Oregon Saw v. McCulloch* 323 F. 2d 758 (9th Cir. 1963).

Even if the claims were susceptible of several constructions, they should be interpreted to preserve to the patentee his actual invention and so as to avoid anticipation. *McClain v. Ortmyer, supra*. *Dominion Magnesium Limited v. United States* 320 F. 2d 388, 398 (Ct. Cl. 1963).

The actual invention is apparatus for saving lives. Abstractions have been introduced, such as protecting dummies or cargo. One of the patents (Pfankuch)

vaguely mentions use of the devices in freight handling, without further explanation. Such far-fetched abstractions should not obscure matters of substance. Such abstractions are not claimed. "Specifications can be used to limit the claims, but not to expand them". *Oregon Saw v. McCulloch, supra.*

The holding of anticipation is directly contrary to a long line of authorities, including a different panel of this Court, which say that for the technical defense of anticipation, a single piece of prior art must bear within its four corners all of the elements in exactly the same situation and united in the same way to perform the identical function. *United States v. Adams, supra. Stauffer v. Slenderella* 254 F. 2d 127 (9th Cir, 1957).

Finding 24 by the District Court states that the four claims in suit define arrangements for preventing a seat occupant from being thrown from his seat, having an inertia locking device mounted on the back of the seat, and means responsive to abnormal movement of the seat occupant for locking the device. The decision here (p. 4) points out that it is the inertial force of the body to which the apparatus is coupled that is used to activate the locking device. Trolley catchers do not have these elements and purposes, and they function in a different manner because they respond to the force of a spring on a pole, not to the inertial force of a body.

Anticipation is impossible in accordance with the above authorities and many others.

II.

The Decision Conflicts With a Long Line of Authorities Because It Finds Two Arts Analogous Even Though the Arts Are in Completely Different Fields and for Completely Different Purposes.

The decision states (p. 10) that the basic concept is a spring-wound reel having certain characteristics, and that the trolley catcher reels are similar and hence are analogous art.

This takes into consideration only a portion of the inventions, rather than the subject matter as a whole. 35 USC 103 requires otherwise.

The subject matter as a whole is "safety apparatus for preventing a seat occupant of a vehicle from being thrown off his seat" (e.g Pfankuch claim 7). The pertinent art is that which would have been considered by a person having ordinary skill in the field to which the claims are directed. Inventors are not charged with knowledge of all arts. *In re Van Wanderham et al.* F. 2d 154 USPQ 20 (CCPA June 15, 1967). *Application of Krogman* 223 F. 2d 497 (CCPA 1955).

Plaintiff contended throughout the Patent Office proceedings that the patents in other fields were non-analogous. This includes Sharpe, Scheuer, Caouette, Foss and Rutledge [Ex. 131, e.g. pp. 67, 68, 83]. The Patent Office Board of Appeals agreed, stating that those patents are for a different purpose [Ex. 131, pp. 90, 91].

Authorities which say that the subject matter as a whole must be considered rather than components are *Potts v. Cragger* 155 U.S. 597 (1895), where a wood polishing machine was held nonanalogous to a machine to disintegrate and pulverize clay even though the same components were employed in each (the machines were

for different purposes and different industries); *Hobbs v. Beach* 180 U.S. 383 (1901) where an addressing machine was held nonanalogous to a machine for attaching stays to boxes; *A. J. Deer Co., v. U.S. Slicing Mach. Co.* 21 F. 2d 812 (7th Cir, 1927) where art of meat holders and the art of sawmill appliances were held nonanalogous; *In re Bennett* 65 F. 2d 144 (CCPA, 1933) where tin cans were held nonanalogous to sheet steel barrels; *Stearns v. Tinker & Rasor* 220 F. 2d 49 (9th Cir, 1955) where a different panel of this court held a snap switch for opening and closing an electrical circuit nonanalogous to a device for determining the condition of pipe coating even though the device employed the snap switch; *Kaakinen v. Peelers Company* 301 F. 2d 170 (9th Cir., 1952) where a different panel of this court held patents to shrimp peelers valid over cornhuskers, rock and gravel strainers, peanut stemmers and onionskinners; and *In re Van Wanderingham et al, supra*, which reviews many authorities and held a heat exchanger nonanalogous to a cryogenic system even though the heat exchanger was employed as a component of the cryogenic system. The court emphasized that the subject matter as a whole must be considered, even though the whole employs a component from another art.

The decision here conflicts directly with the seven cases above.

III.

The Decision Conflicts With a Long Line of Authorities That Have Construed the Statutory Test for Obviousness Because It Employs a Hindsight Test, Rather Than Looking at What Was Known at the Time the Inventions Were Made.

The decision states (p. 12) that if appellee's engineers had considered trolley catchers, the inventions here would have been obvious.

The decision points out (p. 7) that trolley catchers are old and familiar devices. Appellee's engineers were aware of them. So were engineers of appellee's main competitor. Yet as a matter of fact the inventions were not obvious at the time to those leaders in the art.

Obviousness requires a factual inquiry. It is essentially a question of fact and subject to the clearly erroneous rule. *Graham v. John Deere Co.* 383 U.S. 1 (1966). *Skinner Co. v. Continental Industries* 346 F. 2d 170 (10th Cir, 1965). *American Technical Machine Corp. v. Caparotta* 339 F. 2d 557 (2nd Cir, 1964).

At the time of the inventions in suit, it is undisputed that all of those working in the art were thinking in terms of devices which respond to abnormal movement of the vehicle itself. Sensing inertial movement of a seat occupant was new. The Air Force doubted that it would work because it was radical departure.

With the advantage of hindsight, the Court has broader vision than those skilled in the art had in 1953. This is condemned by a long line of cases. *Graham v. John Deere, supra*. *In re Van Wamderham, supra*. *Application of Hofstetter* 362 F. 2d 293 (CCPA, 1966).

The above authorities require an objective test based upon the factual situation in 1953, not the subjective test today which was employed in the decision.

Respectfully submitted,

C. RUSSELL HALE,

D. BRUCE PROUT,

Attorneys for Appellee.

Certificate of Counsel

I, D. Bruce Prout, one of the attorneys for the appellee, certify that in my judgment this petition is well founded and it is not interposed for delay.

D. BRUCE PROUT

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON HODGE, aka
CHICK DE LEO

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

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IN THE UNITED STATES COURT OF APPEALS
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Appellant,

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Appellee.

APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant Aaron Hodge to be guilty as charged in a one-count indictment, following trial by jury. ^{1/}
(C.T. 5)

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2312 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

^{1/}

"C.T." means Clerk's Transcript.

STATEMENT OF THE CASE

Appellant was charged in a one-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The one-count indictment alleged that appellant knowingly and intentionally transported a stolen 1962 Chevrolet Station Wagon in foreign commerce from Los Alamitos, California through the Southern Division of the Southern District of California to Tijuana, Baja California, Mexico, and further alleging that at the time appellant knew said motor vehicle to be stolen. (C.T. 2).

Jury Trial of appellant commenced on March 23, 1965 before United States District Judge James M. Carter (C.T. 4, 5). Appellant waived his right to counsel and proceeded in pro per. James Curto was appointed to assist appellant. (3/16 R.T. 1, 4). ^{2/} Appellant was found guilty as charged in the one-count indictment on the same date, March 23, 1965. (C.T. 5).

Thereafter on April 12, 1965, appellant was committed to the custody of the Attorney General for the maximum period of five years for a study in Title 18, United States Code, Section 4208 (c). (C.T. 7).

After the study was completed appellant was returned to the Court on August 9, 1965, and the sentence was reduced to four years pursuant to Title 18, United States Code, Section 4208 (a) (2).

^{2/} "3/16 R.T." means Supplemental Reporter's Transcript of March 16, 1965.

Appellant subsequently, on August 16, 1965, filed a Notice of Appeal (C.T. 11-12).

III.

ERROR SPECIFIED

The errors specified by appellant are paraphrased as follows:

- A. Plain error is alleged.
- B. Appellant didn't effectively waive counsel.
- C. The conduct of the trial allegedly shows incompetence to waive counsel.
- D. Appointment of counsel in an advisory capacity was insufficient.
- E. Fourth Amendment applies to searches and seizures by Mexican officers in Mexico.
- F. Statements to United States Officers in Mexico were fruit from the poisoned tree.
- G. Statements by appellant concerning other crimes should not have been admitted.

IV.

STATEMENT OF THE FACTS

Mrs. Naomi Earl Rook parked her 1962 Chevrolet Station Wagon, bearing California License LTB-114, in front of the Food Giant grocery store at about 3:00 P.M. on January 13, 1965. (R.T. 9, 10, 13). ^{3/}

She left the keys in the car and when she returned at 3:30 P.M. her car was gone (R.T. 13). She didn't know the appellant and didn't give him permission to take her car. (R.T. 12).

Appellant was then found in Tijuana the same evening (January 13, 1965) trying to sell the automobile for \$200.00, then later \$100.00. (R.T. 21-23, 29). He said the car was "hot stuff". (R.T. 21).

The guitar player at the Lido Bar, Jose Guadalupe Cortes, and a client of his rode with appellant to the La Welita Cafe in the 1962 Chevrolet Station Wagon. (R.T. 22).

Jose Anaya and Tamayo, two Mexican police officers, and a Liaison Officer from the San Diego Police Department came to the La Welita Cafe. (R.T. 36, 37, 39, 47). This was about 8:00 P.M. (R.T. 51). The officers had information that someone there "was trying to sell a car very cheap because it was a stolen car." A set of keys was taken from the right hand side pocket of appellant's trousers and the officers found they fit the 1962 Chevrolet Station Wagon. (R.T. 53).

Appellant told officer Trevino of the San Diego Police Department that two colored gentlemen, whom he had met while hitchhiking, were to pay him \$25.00 to sell the car and that they were directly across the street in a red 1955 Chevrolet (R.T. 55, 56) and that he had lived in Los Alamitos where the car was stolen from (R.T. 59).

No car was found that answered the description (R.T. 60), and no negroes were found in the area (R.T. 38, 46, 73).

Appellant testified he was merely trying to find a person in Mexico who would loan \$200.00 on the car for \$25.00 interest (R.T. 67). Appellant also testified "He told me he didn't have the pink slip to the car, but showed me a notarized bill of sale with a California seal on it...."

Appellant didn't tell Luis Munoz, Special Agent, Federal Bureau of Investigation, anything about a loan but rather said "he had been offered twenty-five dollars to help these two individuals sell the automobile in Tijuana." (R.T. 77).

Appellant admits to having served in a reformatory in Minnesota in 1959, and further admitted he had been convicted of a misdemeanor when he signed a pink slip wrong. (R.T. 69).

Appellant's first cousin, who was familiar with appellant's reputation for truth and veracity, testified his reputation was "bad". (R.T. 80-81).

Appellant waived his right to have an attorney, but Judge Carter appointed James Curto to sit at counsel table for assistance and advice. (3/16 R.T. 3-4).

V

ARGUMENT

A. THERE IS NO PLAIN ERROR.

Appellant admits that none of the specified errors was brought to the attention of the trial Court. (A.B. 20).^{3/}

The conviction should not therefore be reversed unless there is plain

error.

Though clearly within the power of this Court, finding of plain error is a "power rarely exercised" in this Circuit.

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Bilboa v. United States, 287 F.2d 125 (9th Cir. 1923)

Similar restricted approaches to the plain error rule have been taken in other circuits.

Johnson v. United States, 291 F.2d 150 (8th Cir. 1961)

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)

Examination of the issues shows clearly that there is no plain error in this case.

B. APPELLANT EFFECTIVELY WAIVED COUNSEL.

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." However, the Constitution does not require that an attorney be forced upon the defendant.

Carter v. Illinois, 329 U. S. 173, 174-5 (1946).

The right can be waived by a defendant, if the waiver is made competently and intelligently.

Johnson v. Zerbst, 304 U. S. 458 (1937)

The responsibility for the determination of whether or not there is a competent and intelligent waiver of the right to counsel rests with the trial judge.

See Johnson, *supra*, at 465.

Whether there has been an intelligent waiver depends in each case upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused.

Johnson, supra at 464.

Appellant relies upon the case of Von Moltke v. Gillies, 332 U. S. 708, 724 (1948), to support his contention that he did not intelligently waive his right to counsel in this case. The facts in Von Moltke would seem to distinguish it from this appeal, and render it inadequate precedent for appellant's contention. Von Moltke is an extreme case. The defendant was a resident alien, arrested for conspiracy to violate the 1917 Espionage Act and punishable by death. She signed a written waiver of counsel after a five minute summary proceeding before a judge unfamiliar with the facts of the case. It is no surprise that she was found to have made no valid waiver.

It is quite evident from the record in the instant case that the appellant suffered no similar disabilities and was well able to make the intelligent waiver required by law. To begin with, the cases are patently different in that appellant was represented by counsel in all pre-trial proceedings. Then on March 16, 1965, a hearing was held before Judge Kunzel to discuss appellant's request for a waiver of counsel.

At that hearing the appellant stated,

"Due to some circumstances that have come up in the case, I would like to fight it myself . . . I feel that I have a better

chance there than an attorney that don't know the circumstances
of the witnesses" (3/16 R. T. 6). ^{4/}

The court then questioned appellant as to whether he felt competent to handle his case, whether he understood procedures, and whether he knew how to select a jury. Appellant's responses indicated at least a familiarity beyond that of the average layman. (3/16 R. T. 6).

Appellant insisted on his right to conduct his own defense, even though he was warned three times by the court that he was making a mistake and would be operating at a distinct disadvantage. (3/16 R. T. 7-8).

Unable to convince appellant of the difficulties involved in making his own defense, the court then appointed Mr. Curto as defendant's counsel in an advisory capacity. Throughout the trial, competent counsel was present at the defense table, ready to consult with and advise the appellant should he have any difficulties. Appellant admits shortly before the commencement of the trial, appellant was once again advised of his right to confer with the appointed counsel at any time. (3/16 R. T. 5).

Just before the commencement of trial, Judge Carter gave appellant a final admonition in these words:

"One thing more before you leave. I am not going to lead you by the hand, here - - I am not going to try the case. You were given a chance to have a lawyer. You are going to have a lawyer to talk to. If you get in trouble, you are going to have to bail yourself

^{4/}

"3/16 R.T." refers to Supplemental Reporter's Transcript of March 16.

out. I can't be your lawyer, and the judge too." (3/16 R.T. 6).

The Court did however intervene in appellant's behalf (R.T. 36).

Despite the admonitions of the Court, and its extensive questioning of appellant, this appeal contends there was no valid waiver, because there was no lengthy discussion of penalties, possible defenses, limitations on admissible evidence, etc., by the Court.

In one case it was said:

"Nor is it the duty of the trial court judge to explain and set out for an accused the possible defenses he might adduce to the charges against him. If an accused were represented by counsel, it most obviously is not the duty nor the privilege of the judge to suggest or explain possible defenses in behalf of accused. And upon finding a competent, intelligent and intentional waiver of counsel, it is not then any the more the duty of the trial judge to advise an accused respecting possible defenses[I]t is not the duty or the responsibility of the trial judge to give legal advice to an accused, or to any party in any federal proceeding."

Michener v. United States, 181 F.2d 911 at 918 (8th Cir. 1950)

The cases seem to find the waiver of counsel as valid where the trial court, as here, extensively reviewed the consequences of a propria persona defense for the defendant.

Williams v. Swope, 186 F.2d 897 (9th Cir. 1951).

O'Keith v. Johnston, 129 F.2d 889 (9th Cir. 1942).

United States v. Redfield, 197 F.Supp. 539 (D.C. Nev. 1961).

To the contrary, it appears that an invalid waiver of counsel is only found in extreme cases such as Von Moltke, supra, where the record gives no indication of a voluntary waiver.

An example of a competent and intelligent waiver which was recently upheld is found in the case of Heine v. United States, 363 F.2d 716 (5th Cir. 1966). In Heine, the valid waiver merely consisted of the defendant answering "No, sir" three times when asked by the trial court if he desired counsel, after he had been advised of his rights and the consequences of defending himself.

Two experienced judges here found a valid waiver.

C. CONDUCT OF THE TRIAL SHOWS APPELLANT'S COMPETENCE TO WAIVE COUNSEL.

It is true, as alleged by appellant, that in a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.

Appellant, however, without citation of any authority, attempts to extend this truism far beyond its logical bounds. It is alleged that since he did not make proper and timely objections at trial in his own defense, the court should have taken upon itself the obligation to raise these objections and defenses in appellant's behalf. It is submitted that this view is not in keeping with a trial court's proper function, and is contrary to existing case law.

"When appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the court act as his counsel whenever he seemed to be blundering. It cannot be said that court denied him representation of counsel, or denied him a fair trial, because the judge refrained from intermeddling."

Burstein v. United States, 178 F.2d 665 (9th Cir. 1949).

To the same effect is the following language in Smith v. United States,

216 F.2d 724 at 727 (5th Cir. 1954).

"The fact that timely objection was not made on the trial is one of the risks the accused assumed when he undertook to defend himself, and we cannot now for the first time find that the trial court committed error in its proceedings when such alleged error was not called to the court's attention in time for corrective measures to be taken at the trial

"Once it is found, however, that such an accused has properly waived his right to counsel, the effects flowing from that decision must be accepted by him, together with the benefits which he presumably sought to obtain therefrom"

An accused has an unquestioned statutory right to defend himself, as long as he makes his wishes known prior to trial. Title 28, United States Code, Section 1654.

See: Duke v. United States, 255 F.2d 721 (9th Cir. 1958).

Courts are jealous of the right of a defendant to be represented by counsel, but a defendant can waive this right and should not be heard to complain when he knowingly and designedly does so.

Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962).

The record is replete with evidence that appellant conducted his defense very ably for one possessed of only a layman's knowledge of the law. There is no indication that appellant was lacking in intelligence, nor that he was "manifestly not competent" to conduct his defense as alleged, nor that he was guided "more by force of ego than intelligence." It is true that his actions at times were lacking in technical nicety, but it is submitted that this is typical of propia persona proceedings.

Appellant objected during the trial at least 8 times and some of the objections were sustained (R. T. 36). He excused two jurors while the government excused only one (3/23 R.T. 13, 14). Appellant wanted the jury polled. (R. T. 120).

Appellant exhibited a surprising ability to convey his thoughts in legal language throughout the trial, an ability which belies his present claim of incompetence. His closing argument (R. T. pgs. 93-95) provides some very good examples. In that argument he discussed the fact that the prosecution must prove his guilt beyond a reasonable doubt (R. T. 93), indicated that all essential elements of the crime must be proved (R. T. 93-94), defined

"commerce" and "stolen" as found in the Dyer Act (R. T. 95), pointed out that the prosecutor has the right of rebuttal (R. T. 94), quoted the applicable statute (R. T. 95), and pointed out where he believed his conduct varied from that required to find an offense (R. T. 95). He set forth his defense in clear and and concise terms.

It should also be noted that appellant's cross-examination of witnesses, decried as inept in his brief, was in almost all cases as extensive as the government's direct examination.

He also called a witness in his behalf (R. T. 70).

D. APPOINTMENT OF COUNSEL IN AN ADVISORY CAPACITY WAS SUFFICIENT.

It is obvious from the record that the trial court wanted appellant to have the assistance of counsel, both for his benefit, and to insure the orderly progress of the trial. When appellant unequivocally announced his intention to conduct his own defense, Mr. Curto, an established and competent counsel (3/16 R.T. 7) was appointed to advise appellant, and appellant was encouraged to consult with him whenever necessary.

This procedure was approved by the court in United States v. Cantor, 217 F. 2d 536 (2nd Cir. 1954).

This was the only balance the trial court could find to aid in walking the legal tight-rope it was confronted with.

Appellant makes much of the fact that the record only indicates two instances where he consulted with Mr. Curto, although it is admitted that other,

non-recorded, consultations may have occurred. It is also alleged that the absence of sustained objections is indicative of Mr. Daroff's ineffective counseling. However, during the course of a brief trial, appellant did raise at least eight objections, and it is submitted that an equally valid hypothesis for the absence of further objection was the lack of valid points on which to base an objection.

E. THE FOURTH AMENDMENT DOES NOT APPLY TO MEXICAN OFFICERS IN MEXICO.

Appellant was arrested by Mexican officers presumably for violation of Mexican law.

Appellant admits that Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965) cert. den. 382 U. S. 963, reh. den. 383 U. S. 923, 2nd mot. reh. den. 384 U. S. 914) holds against him. (A. B. 32).

At page 782 of the Birdsell case, the following language is found:

"that the United States is bound by its Bill of Rights wherever it acts, is inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American Officials were present and cooperated in some degree."

The pertinent facts of Birdsell are identical with the case at hand.

In both cases a local officer was requested by Mexican authorities to accompany Mexican officers to interpret (R. T. 51). No United States Federal officers were present in either case at the time of the search and seizure. (R. T. 54).

"fruit from the poisoned tree."

G. STATEMENTS BY APPELLANT CONCERNING OTHER CRIMES WERE
ADMISSIBLE.

Appellant claimed during the trial that he had no felony conviction, but only a juvenile conviction (R. T. 69).

Appellant is 26 years of age (R. T. 125). The conviction complained of was in 1959 (R. T. 69). This would make his conviction at about age 20. This is consistent with his statement "I have done four years in a penitentiary with adults" (R. T. 126).

Impeachment of defendants who choose to testify by prior felony convictions is clearly permissible.

See: Federal Jury Practice and Instructions, Mathes & Devitt, nos. 9.08 and 9.09 at page 117 and cases cited there.

Prior similar acts and convictions are admissible on the issue of intent and knowledge.

See: Federal Jury Practice and Instructions, nos. 10.07 and 10.08 at page 127 to 130 and cases there.

In this case, the facts elicited are also probative to show that appellant knew "pink slips" were required in transferring title to automobiles registered in California.

Appellant was asked if he "hadn't been convicted of stealing a Ford pick-up." In his usual "glibness" he came up with the story that he had merely signed the "pink slip" wrong (R. T. 70).

Another case where the facts are different but the same Constitutional issue was raised and decided favorable to the Government was United States of America v. Stonehill , 254 F. Supp. 1003 (D.C. N.Y. 1966).

In that case documents that were admittedly seized illegally by the Philippine Government in Manila, and were later admitted against Stonehill in the New York District Court, where the facts showed the United States Government had not participated to any degree in the illegal search and seizure.

The purpose of the Fourth Amendment was to discourage misuse of powers by officers of the United States.

See language in Byars v. United States, 273 U. S. 28, 33.

It can be readily seen the purpose is not, therefore, to regulate the manner in which foreign governments enforce their own laws within their own boundaries.

No United States officer was present. Officer Trevino, San Diego Police Department liaison officer assisted only as an interpreter. (R. T. 54).

Appellant spoke no Spanish and the Mexican officer spoke no English. San Diego Police Officer Trevino made it clear he had no power in Mexico and was only there as a visitor at their request and appellant was their prisoner, not his. (R.T. 55, 61, 62, 74).

F. STATEMENTS TO OFFICERS TREVINO AND MUNOZ WERE NOT
FRUIT FROM THE POISONED TREE.

For the reasons previously stated, there was no illegal search and seizure by the Mexican officers. It must, therefore, follow there is no

The testimony of his witness, Claude Owen Crawford, on the issue, was favorable to appellant.

As said before, no objection was made and no plain error resulted.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


SHELBY R. GOTT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES H. TRIPP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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IN THE
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FOR THE NINTH CIRCUIT

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Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING JURISDICTION

On October 31, 1962, the Federal Grand Jury for the Southern District of California returned an indictment in 26 counts (3923-ND) charging James H. Tripp and Samuel J. Bradford with violations of Title 18, United States Code, Sections 2, 371, and 1010. (Aiding and Abetting, Conspiracy, and False Statement in FHA Transaction.) [C. T. 184-216]^{1/}

On July 10, 1963, the Federal Grand Jury for the

^{1/} "C. T. " refers to Clerk's Transcript.

Southern District of California returned a superseding indictment in 26 counts (No. 3994-ND) charging the defendant James H. Tripp with violations of Title 18, United States Code, Sections 371 and 1010. (Conspiracy and False Statement in FHA Transaction.) On December 9, 1963, the defendant entered his plea of not guilty to all counts. On April 28, 1964, after 8 days of jury trial before the Honorable Myron D. Crocker, a mistrial was declared because of the death of the defendant's father. [C. T. 2-34, 220-221]

On January 26, 1965, jury trial began before the Honorable Myron D. Crocker and on February 5, 1965, the jury found the defendant guilty as to all counts, except numbers 15, 17, 21 and 23. On April 5, 1965, the defendant was sentenced on Count One to a fine of \$10,000 and a one-year period of incarceration: a fine of \$1,000 and a one-year period of incarceration, to be served concurrently with the incarceration imposed on Count One, was imposed on each of the remaining counts. Thus, the total fine laid was \$31,000 and the total period of incarceration imposed was one year. The trial court suspended the execution of the one-year period of incarceration on condition that the fine imposed be paid within 60 days, which condition the defendant apparently satisfied by payment in full on July 14, 1965. [C. T. 174-175, 222] The defendant was evidently not placed on probation. [C. T. 134-135, 173, 221-222; R. T. 1064-1066]^{2/}

^{2/} "R. T. refers to Reporter's Transcript.

A Notice of Appeal was filed on April 5, 1965.

The jurisdiction of the United States District Court for the Southern District of California was based on Title 18, United States Code, Sections 371, 1010, and 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND RULES INVOLVED

A. Statutes:

Title 18, United States Code, Section 371, reads in pertinent part as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both."

Title 18, United States Code, Section 1010, reads in pertinent part as follows:

"Whoever ... for the purpose of influencing in any way the action of such [Federal Housing]

Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, ... shall be fined not more than \$5,000 or imprisoned not more than 2 years, or both."

III

STATEMENT OF THE CASE

QUESTIONS PRESENTED

In order to avoid needless repetition, the appellee will analyze the propositions presented by the appellant's brief in the following order:

(A) May a separate offense be charged under 18 United States Code, Section 1010 for each false document submitted to the F. H. A. on behalf of each individual purchasing or refinancing a home? The indictment does not contain duplicitous counts.

(B) The appellant failed to renew his motion for acquittal at the conclusion of all of the evidence and therefore has waived his right to have the evidence reviewed on appeal.

(C) The evidence is clearly sufficient to sustain the conviction.

(D) The testimony of witnesses Julia Cardona, Johnny Mack Galbraith, Reola Coleen Branum, and Johnny Rosemond are clearly material and the motion to strike it was properly denied.

(E) No objection having been made to the testimony of Mr. Bradford regarding his plea of guilty, no error can now be claimed.

(F) Counts sixteen and nineteen are not defective for failure to use the words "willfully and knowingly."

(G) Counts Four and Twenty-Four of the Indictment state an offense against the United States.

(H) The prosecuting attorney committed no error in closing argument.

(I) The purpose of the conspiracy was to obtain federally insured loans and continued after March, 1962.

IV

STATEMENT OF FACTS

During the latter part of 1961 and 1962 defendant James H. Tripp was the president and owner of Tripp Land Company in Fresno, California. The defendant was engaged in the business of constructing and selling homes in the \$10,900 to \$13,900 price range at two tracts known as King Homes and Regent Homes. [R. T. 61, 228-229, 504-505]

Mr. Samuel J. Bradford was employed by the defendant from July of 1961 until June of 1962. His function was to furnish the real estate brokers license and to see that the paper work was packaged for loans. Mr. Bradford, who was not familiar with FHA rules and regulations, had the defendant's power of attorney.

[R. T. 306, 316, 398, 503-506, 510, 584, 713-714]

T. J. Bettles Company agreed to make loans on the Regent and King Homes tracts subject to FHA insuring the loans. It was agreed that Tripp Land Company, through its officers and employees, would furnish the required information to T. J. Bettles Company concerning prospective purchasers and home owners who wished to refinance their loans. T. J. Bettles Company officers and employees would then prepare the appropriate documents and submit them to the Fresno Office of the FHA. T. J. Bettles Company relied upon the information provided by Tripp Land Company as did the FHA. [R. T. 28-29, 32-34, 49, 52, 55, 58, 63-64, 69-71, 89, 136, 147-148, 190-192, 230, 240-241, 261]

The defendant, during the latter part of 1961, had encountered serious financial difficulties. The defendant held many second trust deeds on homes he had previously sold in the Regent Homes Tract. [R. T. 517]

The defendant, during the latter part of 1961 and early 1962, caused false statements, which are described later in this section of this brief, to be submitted to T. J. Bettles Company, realizing that the false statements would be submitted by T. J. Bettles Company to the FHA in Fresno, California. [R. T. 513-514, 520, 593]

Customarily the FHA required a 3% down payment, and reflecting this requirement as to the homes involved in this case, the defendant's billboard advertisements stated that a \$400 down payment was required. [R. T. 319-320, 391-392]

In the normal course of business, salesmen at the Regent and King Homes tracts would accept a deposit from the home buyer or the individual who wished to finance a home. These deposits were then transmitted to the defendant. In no case did the deposits exceed \$200, and normally they were less than \$50. [R. T. 370, 507, 589-590] As to each person who intended to purchase a new home or refinance a home previously purchased, the defendant maintained separate files indicating the down payment actually made. [R. T. 238, 380-382, 507-508, 510]

Both the defendant and Mr. Bradford took the individual sales documentation to the offices of T. J. Bettles Company. The documentation as to each individual sale which was taken into the offices was in many instances materially false, as subsequently will be described. [R. T. 61, 236, 513-514, 593]

Before these documents were submitted by T. J. Bettles Company to the FHA in Fresno, both the defendant and Mr. Bradford went through the T. J. Bettles Company files paper by paper. The defendant made a list of things which had to be completed as to each file. [R. T. 238, 510-511]

After the documentation had been submitted to the FHA by T. J. Bettles Company, an employee of the FHA contacted an employee of T. J. Bettles Company for additional substantiating data. An employee of the T. J. Bettles Company would then call either the defendant or Mr. Bradford and request additional substantiating data. Employees of the T. J. Bettles Company discussed in detail with the defendant the FHA requirements concerning

additional substantiating data. Within a day or two after the request for additional information, the defendant or Mr. Bradford brought the additional information required by FHA into the T. J. Bettes Company offices. The additional information that was furnished was also materially false. [R. T. 67, 69, 137, 239, 242, 264, 513-514, 520, 593]

The defendant in the latter part of 1961 told his salesmen that if the buyers of homes did not have the required down payment, they could be moved in on a rental basis. As to one particular sale which had not closed, the defendant told a salesman that he would put up the required down payment. [R. T. 711-713, 717-718]

Mr. Samuel Bradford took his instructions from the defendant. The defendant told him to furnish T. J. Bettes Company whatever they needed to close a loan. The defendant told him not to worry about the down payment or the cash-on-hand statements but rather to furnish anything to T. J. Bettes Company which was required to close a loan. [R. T. 503-504, 512-513, 680]

On one occasion Mr. Bradford prepared false statements while the defendant was out of town and submitted these false statements to T. J. Bettes Company for transmittal to the FHA. When the defendant returned to town, Mr. Bradford told him about these false statements. The defendant told him not to worry about it because the loans had to be closed at any cost. [R. T. 515-516, 607-608, 701, 703]

In the latter part of 1961 Mr. and Mrs. Jamison

purchased a home at the King Homes tract. They signed many documents in blank. The defendant caused many false statements to be made to the FHA concerning this transaction, including the following: (1) \$275 had been paid by Mr. and Mrs. Jamison, Count Two, Exhibit 2-K; (2) Mr. and Mrs. Jamison had \$400 cash on hand, Count Three, Exhibit 2-L; (3) Mr. and Mrs. Jamison had paid the defendant \$400 cash and had \$400 cash on hand, Count Four, Exhibit 2-O. [R. T. 455-459, 461-462]

In the latter part of 1961 or early 1962 Mr. Thomas Jefferson purchased a home at the King Homes Tract. He made a \$5 deposit and signed many documents in blank. The defendant caused many false statements concerning this transaction to be made to the FHA, including the following: (1) that Mr. Jefferson had made a \$400 deposit, Count Five, Exhibit 3-O; (2) that Mr. Jefferson paid the defendant \$400 and had \$400 cash on hand, Count Six, Exhibit 3-P; (3) that Mr. Jefferson had \$400 cash on hand, Count Seven, Exhibit 3-M; (4) that Mr. Jefferson had saved \$685, Count Eight, Exhibit 3-K; and (5) that Mr. Jefferson had paid the defendant \$680, Count Nine, Exhibit 3-J. [R. T. 423, 425-427, 431-436]

Mr. Johnny Mack Galbraith purchased a King home in late 1961 or early 1962. He paid a \$5 deposit and signed documents in blank. As to this transaction the defendant caused many false statements to be submitted to the FHA, including the following: (1) that Mr. Galbraith had paid \$400 to the defendant and had \$400 cash on hand, Count Ten, Exhibit 4-I; (2) that Mr. Galbraith had made a \$400 deposit, Count Eleven, Exhibit 4-H; (3) that

Mr. Galbraith had been saving between \$25 and \$30 per month for the past two and one-half years, Count Twelve, Exhibit 4-D, and (4) that Mr. Galbraith had \$400 cash on hand, Count Thirteen, Exhibit 4-E. [R. T. 741-746]

Mr. and Mrs. Willie Johnson purchased a home at the King Homes tract in the latter part of 1961 or early 1962. They made a \$5 deposit and signed many documents in blank. The defendant caused many false statements to be submitted to the FHA concerning this transaction, including the following: (1) that Mr. and Mrs. Johnson had paid the defendant \$675, Count Fourteen, Exhibit 5-I; and (2) that Mr. and Mrs. Johnson paid the defendant \$400, Count Sixteen, Exhibit 5-N. [R. T. 470-474, 476-477, 490]

In August of 1960 Mr. and Mrs. Russell Sowle purchased a home in the Regent Tract. The defendant held a second trust deed on this residence in the amount of \$2,000 which was being paid at the rate of \$20 per month. In early 1962 this home was refinanced at the behest of the defendant. In the refinancing transaction Mr. and Mrs. Sowle made no down payments or cash payments to the defendant. The defendant caused false statements concerning this transaction to be submitted to the F. H. A., including the following: (1) that Mr. and Mrs. Sowle paid \$285 to the defendant on November 7, 1961, Count Eighteen, Exhibit 6-L; and (2) Mr. and Mrs. Sowle paid the defendant \$285 for closing costs, Count Nineteen, Exhibit 6-M. [R. T. 732-734, 736-737]

Mr. and Mrs. Roy Branum purchased a home in the fall

of 1960 at the Regent Homes tract; subsequent to the purchase, the home was refinanced at the behest of the defendant. The Branums also had a second trust deed on this residence on which they paid the defendant \$20 per month. Concerning this refinancing transaction the defendant also submitted many false statements to the FHA, in particular, that Mr. and Mrs. Branum on October 27, 1961, paid the defendant \$280, Count Twenty, Exhibit 7-N. [R. T. 778, 781-784, 786-787, 790]

Before Christmas of 1961 Mr. and Mrs. Arnulfo Cardona purchased a home at the Regent Homes tract. They made a down payment of \$40. They paid \$195 rent between January and June of 1962 but made no other payments. The defendants caused false statements to be made to the FHA concerning this transaction, in particular, that Mr. and Mrs. Cardona paid the defendant \$685, Count Twenty-two, Exhibit 8-I. [R. T. 331-336, 348]

In the latter part of 1961 or early 1962 Mr. Charles Banks purchased a Kings Home. He made a \$40 deposit and signed documents in blank. The defendant caused false statements concerning this transaction to be submitted to the FHA, including the following: (1) that Mr. Banks paid the defendant \$675, Count Twenty-Four, Exhibit 9-N; (2) that Mr. Banks made a deposit of \$400, Count Twenty-Five, Exhibit 9-M; and (3) that Mr. Banks paid the defendant \$675, Count Twenty-Six, Exhibit 9-K. [R. T. 407-408, 410-411, 413-420]

After the nine home transactions were submitted to the

FHA for approval in the latter part of 1961 and early 1962, the federal government began an investigation into the Tripp Land Company. Once the investigation began the defendant, along with Mr. Bradford, in an effort to insure the success of their scheme and in furtherance of the conspiracy prepared false records and attempted to convince home purchasers to lie to the FHA and F. B. I.

In early 1962 the defendant and Mr. Bradford took the original files concerning the transactions we are dealing with here from the defendant's office to his home. The defendant and Mr. Bradford spent almost two days preparing false files and false receipts for payment from the purchasers and false 3 by 5 cards containing the payment record of each buyer. These files, receipts, and 3 by 5 cards were to be used to show the FBI when they came around and checked the defendant's records. [R. T. 521-530].

The defendant prepared the false files, receipts, and 3 by 5 cards from xeroxed copies of the T. J. Bettes files. The false files were last seen in the possession of the defendant's attorney. [R. T. 258-260, 521-532]

After the false documents were prepared, the defendant and Mr. Bradford began contacting the home buyers in order to convince these people to lie to the FHA and the FBI.

In February of 1962, after the FBI began their investigation the defendant and Mr. Bradford met with Mr. and Mrs. Cardona at their home. The defendant told them to go to the FHA and lie

by telling the **FHA** that they had made their down payments. The defendant also had Mr. Cardona endorse a check made payable to the defendant. Ironically, Mr. and Mrs. Cardona did not even have a bank account at this time. [R. T. 336-338, 340, 537, 577-578]

In March of 1962 the defendant met with Mrs. Branum and attempted to induce her to lie to federal officials. He showed Mrs. Branum a false document that he had caused to be filed with the **FHA**. [R. T. 786-789]

In March of 1962 the defendant and Mr. Bradford met with Mr. Johnny Mack Galbraith. Mr. Galbraith told them about the questions he had been asked by a representative of the **FHA**. Another meeting was arranged the next day. At this meeting, which took place at the King Homes Tract, the defendant told Mr. Galbraith to lie to the **FHA**. Mr. Galbraith refused to lie to the **FHA**. The defendant then had Mr. Galbraith sign a check in an amount similar to the cash which had been paid according to the documents which had been furnished the **FHA**. The check was then burned by the defendant. The defendant then wrote out in long hand instructions for Mr. Galbraith to follow when questioned by federal agents, as follows:

- "(1) A friend trying to help me, signed the letter about my saving \$25 - \$30 per month to buy a house.
- (2) \$650 was deposited to buy a King Home and returned to me after I cancelled the sale."

[Exhibit 4AA; R. T. 385-388, 542-545, 556,
657, 748-750, 757]

Around the middle of April of 1962 the defendant and Mr. Bradford met with Mr. Jefferson at the laundry where he was employed. A meeting was arranged at the defendant's office on the next day. On this occasion the defendant told Mr. Jefferson to go down to the FHA and tell them that he had actually paid \$300-\$400 down on the home he had purchased. The defendant also gave Mr. Jefferson phony receipts for payments that he had never made to show the FHA. Following the advice of the defendant, Mr. Jefferson went to the FHA and lied. [Exhibit 14, R. T. 423, 427-429, 442-443, 453-455, 540-541]

In April or May of 1962 the defendant told Mr. Bradford that he was depositing money in Home Title in Fresno to cover up for payments that had not been made by purchasers. In the case of the Cardonas and the Johnsons, the defendant actually made deposits at Home Title on their behalf. [Exhibits 12, 13; R. T. 340, 479, 493, 548-549]

The defendant told Mr. Bradford that he thought everything was going well with the FBI. He thought that Mr. Bradford should talk to the FBI. He told Mr. Bradford that if he and the defendant stuck together on their stories, they would be believed instead of the buyers that were talking to the FBI. [R. T. 535]

Mr. Bradford talked to Special Agent Robert Emonts of the FBI and lied to him. He then reported back to the defendant. The defendant assured Mr. Bradford that he would not be involved

and that he would take the blame if required as everything had been done at his behest in order to get the loans closed. [R. T. 535-536]

On May 11, 1962, the defendant was interviewed by Special Agent Emonts. The defendant lied to Special Agent Emonts. The defendant denied any complicity regarding false statements being submitted to the FHA. He told Special Agent Emonts that he had told Mr. Johnny Mack Galbraith to go to the FHA and tell the truth. He said that Exhibit 4AA, the instructions he had given to Mr. Johnny Mack Galbraith, was a note he made of the conversation. He had no recollection of a check-burning incident concerning Mr. Johnny Mack Galbraith. He also said that he told Mr. Jefferson to go to the FHA and tell the truth and, finally, denied any discussion with the Cardonas concerning a check. [R. T. 761, 763-768]

V

ARGUMENT

A. THE INDICTMENT DOES NOT CONTAIN DUPLICITOUS COUNTS

A separate offense under 18 U. S. C. §1010 is properly charged in separate counts alleging the submission of a false document to the FHA.

Appellant argues that certain counts of the indictment are duplicitous in that the same acts are alleged as different crimes.

It is well settled that the same act may constitute separate and distinct offenses and may be charged as such in separate counts of an indictment. Gore v. United States, 357 U.S. 386 (1957). However, appellant's contention is immaterial to the determination of this appeal since the same acts are not alleged as constituting different crimes. As appellant's quotations from the indictment indicate, each count alleges that a false statement was made by the defendant at different times and in different documents submitted to the **FHA**.

Appellant relies on Bins v. United States, 331 F.2d 390 (1964) for the proposition that the indictment in this case is duplicitous. Bins, contrary to appellant's contention, holds that where separate documents are submitted to the **FHA**, each of which contains a false statement, the indictment is duplicitous unless each false statement (separate document) is alleged in a distinct and separate count. In the court's words:

"The filing of each false document would constitute a crime, and each should be alleged in a separate and distinct count of the indictment."

331 F.2d at 393.

The above-quoted language from Bins is squarely in point. On these facts, the government was required to and did separately state each false statement in separate counts. Accordingly, the indictment is not duplicitous.

In accordance with the decision in Bins, is United States v. Cuddeback, 192 F.Supp. 860 (1961), where a multi-count

indictment was held valid against a claim that it was duplicitous. Each count charged an application for a loan to a different borrower on a different date, and each application was false. In denying defendant's motion to dismiss, the court pointed out that separate false application for federal housing loans, although similar, were punishable as separate offenses and were therefore properly charged in separate counts of the indictment.

United States v. Private Brands, 250 F.2d 554

(1957) (each false statement was a separate offense, although all related to a single contract),

See also, Ebeling v. Morgan, 237 U.S. 625 (1915)

(successive cutting out of separate mail bags constitutes separate offenses although part of one course of conduct).

As appellant accurately states, 18 U.S.C. §1010 provides that publishing any false statement is punishable. The statute is framed in the singular and is clearly directed at each false statement, not to a course of conduct involving a single criminal impulse. This construction of false statement statutes has long been applied.

Berg v. United States, 176 F.2d 122 (9th C. A. 1949):

United States v. Simon, 186 F.Supp. 223

(D. C. N. Y. 1960)

The proposition relied upon by appellant, i. e., that if the same evidence is used to prove different counts, a fortiori,

the counts are duplicitous, is simply not the law. As framed in Blockburger v. United States, 284 U.S. 299 (1932), the test of whether two offenses have been committed is whether each requires proof of a different element.

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

284 U.S. at 304 (Emphasis added)

Here, a different fact must be proved to support a conviction under each separate count, namely, the publication of a separate and distinct false statement. The same evidence does not prove different counts, contrary to appellant's contention, since each count requires proof of an entirely different document. It can not be argued that proof, for example, of appellant's false cash-on-hand statement (Count 3) would establish that he submitted a false 2004(c) form (Count 6). Of course the statements are false each time they are published, as appellant points out, but each act of making, passing uttering, or publishing, etc. is a false statement and is therefore a separate offense. See Driscoll v. United States, 346 F.2d 324 (1st C. A. 1966).

Finally, Berg v. United States, supra, and cases cited therein, indicate a general uniform construction of false

statement statutes to penalize each individual false statement. This issue was fully discussed in an analogous case by a New York federal district court. In United States v. Simon, 186 F.Supp. 223 (U. S. D. C. S. D. N. Y., 1960), defendants moved to dismiss several counts on the ground that the same false statement was alleged in each count as a separate offense. Each count, however, alleged that the false statement was made in a separate document (different Veterans Administration forms). In rejecting appellant's contention, the court said:

"Section 979(i) defines the crime as the presentation of any false certificate concerning any claim for payment. The filing or presentation of each false certificate is a crime in itself ... the Second Circuit has interpreted an analogous statute, 18 U. S. C. §1001, to make the unit of prosecution each false statement. United States v. Private Brands, Inc., 1957, 250 F.2d 554 ... The decision in United States v. Private Brands, Inc., *supra*, is more than a simple analogy, and is buttressed by Berg v. United States (C. A. 9, 1949), 176 F.2d 122, and cases cited therein, indicating a generally uniform construction of false statement statutes to penalize each individual false statement."

186 F. Supp. at 227.

B. THE APPELLANT FAILED TO RENEW
HIS MOTION FOR ACQUITTAL AT THE
CONCLUSION OF ALL OF THE EVIDENCE
AND THEREFORE HAS WAIVED HIS
RIGHT TO HAVE THE EVIDENCE RENEWED
ON APPEAL

An examination of the record in this case fails to disclose that the appellant moved the trial court for an acquittal at the close of all of the evidence. In appellant's opening brief this point is evaded by his statement that the motion for judgment of acquittal was made but not reported. (Appellant's Brief, p. 2, footnote 1) With respect to appellant's gratuitous conclusion that "the Government does not contest this fact," we can only rely on what the transcript and record of the case reflect, namely, that neither the court's record nor the transcript of the proceedings indicates the existence of such motion.

In the absence of such a motion, it is well settled, as stated in Lucas v. United States, (C. A. 9, 1963) 325 F.2d 867, at p. 868, that:

"Defendant is not entitled to have this court review the record to determine whether the evidence was insufficient in the particular claimed. He did move for an acquittal at the close of the Government's case, but when that motion was denied he introduced evidence on his own behalf, thus waiving any error in that ruling. Mauding v. United States, (C. A. 9, 1953) 257 F.2d 59; Anderson v. United States,

(C. A. 9, 1952) 253 F. 2d 419; Powell v. United States, (C. A. 9, 1930) 35 F. 2d 941. And since he did not renew the motion at the conclusion of all the evidence, he failed to secure a ruling that he could challenge on appeal. (Emphasis added) Ege v. United States, (C. A. 9, 1957) 242 F. 2d 879; Hardwicke v. United States, (C. A. 9, 1961) 296 F. 2d 24. The above holding was recently affirmed in Robbins v. United States, (C. A. 9, 1965) 345 F. 2d 930, 932. "

Although this court, in its discretion, may notice errors not properly raised where failure to do so would "shock its judicial conscience and operate as a palpable miscarriage of justice," the appellee respectfully contends the facts of this case demonstrate that no such situation exists in the instant case. See Statement of Facts set forth in this brief.

C. THE EVIDENCE IS CLEARLY SUFFICIENT
TO SUSTAIN THE CONVICTION

Notwithstanding appellant's failure properly to raise his questions as to sufficiency of the evidence, the following testimony when read in conjunction with appellee's statement of facts, will clearly indicate the existence of substantial evidence to support the verdict.

1. The Defendant Had Knowledge of
the False Statements

1. The appellant hand-carried loan documents to the office of the mortgage banking concern, T. J. Bettes Company, during 1961 and 1962 which were subsequently submitted to the FHA. [R. T. 61, 236]

2. The defendant was thoroughly conversant with the contents of the mortgage loan files of respective purchasers which were submitted to the FHA.

Mr. George E. Glover, Vice President and Branch Manager of the T. J. Bettes Company testified:

"Q. Did any individual from Tripp Land Co. ever go through these files.

A. Yes.

Q. And who would go through those files from Tripp Land Company?

A. Mr. Tripp and Mr. Bradford.

* * *

Q. Now, when Mr. Tripp went through the file, would he go through it paper by paper?

A. Yes.

Q. Did he make comments concerning the file?

A. Yes.

Q. To you?

A. Yes.

Q. Now, did Mr. Tripp go through the file paper by paper prior to the time these files were originally submitted to the FHA?

A. Yes.

Q. Did there come a time when these files were placed in your office?

A. Yes, there was.

Q. Why were they placed in your office?

A. Because they were coming in so often to check them.

Q. How often would they come in? and by "they", of course, I am referring to Mr. Bradford and Mr. Tripp. How often would they come in during a particular week ...

A. It was quite often. Many times they would be in twice a day and maybe in another week they'd be in maybe once a day, every day that week and may be three times a week. "

[R. T. 237-238]

Mr. Glover further testified that when the FHA requested additional substantiating information with respect to a loan application, he would in turn telephone the defendant Tripp who thereafter would bring the requested information to T. J. Bettes Co. [R. T. 242-243]

On one occasion, Mr. Glover testified, while with Mr. Tripp in Tripp's office, he copied information from 3 x 5 cards.

The information on these cards was materially false. The T. J. Bettes Co., relying on this information, forwarded it to the FHA. [R. T. 224-247] Government's Exhibit 21, a letter to the FHA concerning the purchase of a home by Mr. Arnolfo H. Cardona, reflects an example of the information copied from the 3 x 5 cards in Mr. Tripp's possession and sent to the FHA. The letter stated that Mr. Cardona has paid \$35 as the balance of the down payment; \$50.00, \$85.00, and \$75.00 as part of the closing costs; and a total of \$263.00 as rent between February and April 1962. [R. T. 259] Mrs. Cardona testified that the entire payments made by herself and her husband on that home were \$49.00 down payment and \$195.00 in rent between January and June 1962. [R. T. 331-332]

2. The Defendant's Sole Motivation
Was to Close the Loans on the
Homes He Was Selling

Mr. Bradford testified that defendant Tripp instructed him:

"... to get all the documents, anything necessary, that it would take to close these loans, anything that the loan company requested, for me to get it for them. That it was not my job to worry about the down payment that those people were paying on the closing costs; that my job was merely to package the payments and see to it that it got to the loan company for processing as quickly as possible.

Q. Did he say anything at this time, in this conversation, concerning the cash on hand statements?

A. Yes, sir.

Q. What did he say?

A. He said that it wasn't my job to worry about the cash on hand.

Q. Did he say anything on this occasion concerning the money involved?

A. Well, again, he said that it wasn't my job to worry about where the money was coming from or who was paying it."

[R. T. 512-513]

After this conversation with the defendant, Mr. Bradford testified, in late 1961 and early 1962, while the defendant was out of town, he submitted a series of letters to the T. J. Bettes Co. containing false information as to the payments made by purchasers to the Tripp Land Co. These "To Whom It May Concern" letters were thereafter submitted to the FHA. [R. T. 512-513] Mr. Bradford further testified that upon the defendant's return he informed Mr. Tripp of his actions, i. e.:

"I explained to Mr. Tripp what had happened and Mr. Tripp told me not to worry about it, that he would take care of it; that it wasn't my job to worry about it -- to worry about the company. "

[R. T. 515-516; 607-608; 701, 703]

Mr. Tripp similarly advised his salesmen that if the

buyers did not have the required down payment they could be moved in on a rental basis. [R. T. 712-713] On one occasion the defendant advised a salesman that he would put up the required down payment. [R. T. 717-718]

3. The Defendant Knew of His Own Knowledge That Purchasers Were Not Making \$400.00 Down Payments Although the Records Submitted to the FHA Reflected to the Contrary

Mrs. Margaret Henry, who works in a secretarial capacity at the King Homes tract of the Tripp Land Co., testified that it was part of her job to write receipts for deposits or for down payments received from a potential buyer. Mrs. Henry testified that she never received a deposit or down payment in the amount of \$400.00. She further stated that the largest amount of any deposit she received was about \$50.00. All of the money she received was turned over to Mr. Bradford. [R. T. 369-370]

Mr. Bradford testified that the largest amount of cash received for a down payment or deposit from a purchaser was approximately \$200.00 and that he collected the money from the salesmen and secretaries and in turn delivered the money to Mr. Tripp's office. [R. T. 507]

Mr. James Roseman, a salesman for Mr. Tripp at the King Homes tract, testified that the largest down payment he ever received from a purchaser was \$10.00. [R. T. 713]

The testimony of eight purchasers, Jamison, Jefferson,

Galbraith, Johnson, Smith, Branum, Cardona, and Banks, all reflects that between \$5.00 and \$50.00 was all that was paid as a deposit, an amount nowhere near the \$400.00 reflected in their respective loan applications submitted to the FHA.

4. The Evidence Is Overwhelming As To
The Extent of False Information
Submitted to the FHA

In addition to the "To Whom It May Concern Letters" which contained blatantly false information, testimony respecting nine separate transactions concerning home purchasing and home re-financing were introduced into evidence.

The eight witnesses, Jamison, Jefferson, Galbraith, Johnson, Smith, Branum, Cardona, and Banks each were shown numerous exhibits from their respective files and each testified unequivocally as to the falsity of the information contained therein and submitted to the FHA. The testimony of the eight purchasers is summarized in appellee's Statement of Facts.

5. The Defendant Knowingly and Willfully
Attempted to Conceal the False
Statements Submitted to the FHA by
Fraud and Chicanery

Mr. Bradford testified that after the FBI investigation of the instant case had commenced, the defendant, Mr. Tripp, and the witnesses clandestinely met at the defendant's home to falsely

conform the files of the Tripp Land Co. with the information submitted to T. J. Bettes Co. and the FHA. For two full days the defendant and Mr. Bradford worked at the defendant's home preparing false files, false receipts for payment from home purchasers, and false 3 x 5 cards containing the payment record of each buyer. These files, receipts, and 3 x 5 cards were to be used as a decoy to be shown to the FBI if an examination of the defendant's records occurred. [R. T. 521-530]

In addition, the defendant and Mr. Bradford contacted several home buyers in order to convince these people to fabricate the events to the FHA and the FBI. A detailed summary of this aspect of the defendant's activities is discussed in the appellee's Statement of Facts relating to the defendant's conversations in February and March 1962 with Mr. and Mrs. Cardona and with Mrs. Branum concerning what they should tell the FHA regarding their financial dealings with the defendant, and to the defendant's meetings with Mr. Johnny Mack Galbraith and Mr. Jefferson to encourage them to falsify their remarks to the FHA. The appellee's Statement of Facts also treats at greater length the defendant's instructions to Mr. Bradford prior to his interview with the FBI to the effect that if they stuck to the same stories these stories would be believed instead of the buyers' stories.

6. The Defendant's Statements Given to the FBI Were Materially Inconsistent With the Testimony Adduced at Trial Which reflected His Knowledge and Participation in the Offenses Charged.

The defendant's denial of any complicity or knowledge regarding the central issue of this case, namely, the submission of false statements to the FBI, is in direct conflict with the testimony and facts adduced at the trial, specifically:

- (1) that he had carried loan application information to the T. J. Bettis Co. [R. T. 61-236]
- (2) that he was thoroughly conversant with the contents of the mortgage loan file submitted to the FHA which contained false information [R. T. 237-238]; and
- (3) that he received the cash collected from his agents, which never equalled the \$400.00 down payment or deposit required, although the loan applications reflected the opposite. [R. T. 369-370, 507, 713]

The defendant's account of his activities after the investigation in question commenced also materially varies from the testimony of others concerning them adduced at trial. The defendant informed the FBI that he told Johnny Mack Galbraith to go to the FHA and tell the truth. Mr. Galbraith testified that Mr. Tripp attempted to induce him to tell the FHA that a friend of his

had signed a letter bearing his purported signature which has been submitted to the FHA relating the fact that Mr. Galbraith had been saving \$25.00 to \$30.00 per month toward a down payment.

Exhibit 4(d). Additionally, Mr. Galbraith stated that the defendant gave him a check for \$645.00, which he signed. The defendant thereafter immediately took the check back, tore it up, and burned the pieces. The check was to constitute Mr. Galbraith's alleged down payment on his home. When interviewed by the FBI, the defendant did not recall the incident. [R. T. 749a, 542, 545, 556, 657, 748-750] When questioned by the FBI the defendant also denied instructing Mr. Jefferson, another purchaser, to lie to the FHA. Mr. Jefferson stated that Mr. Tripp told him to tell the FHA that he had paid \$300.00 down on the home, when, in truth, Mr. Jefferson had paid only a \$5.00 deposit.

Finally, although the defendant once again denied any knowledge of such an incident, Mrs. Cardona testified that the defendant came to her home and asked her husband to sign a check in the amount of \$685.00, informing the Cardonas that they need not worry if they did not have enough to cover the check as it would not be cashed immediately. [R. T. 339-340, 771-772]

D. THE TESTIMONY OF WITNESSES
JULIA CARDONA, JOHNNY MACK
GALBRAITH, REOLA COLEEN
BRANUM, AND JOHNNY ROSEMOND
ARE CLEARLY MATERIAL AND
THE MOTION TO STRIKE IT WAS
PROPERLY DENIED.

The testimony of each of the above witnesses is clearly material as to the substantive counts of the indictment as well as to reflect knowledge and intent on the part of the defendant in the commission of the crimes charged.

(a) Julia Cardona testified that on a date after the investigation by the FHA in this matter commenced, the defendant approached herself and her husband and requested them to endorse a check in the amount of \$685.00 to conceal a previously submitted false statement, namely, the "To Whom It May Concern Letter" submitted to the FHA reflecting that the Cardonas had paid \$685.00 to the Tripp Land Co. as down payment and closing costs on their home. [Exhibit 8-i, R. T. 335, 339]

This testimony specifically covers Overt Act No. 9, of the Conspiracy, Count No. 1, and is clearly material to reflect the defendant's knowledge of the existence of the falsity of the information submitted to the FHA and his intention to attempt to cover it up.

(b) Mr. Johnny Mack Galbraith testified that although he paid only a \$5.00 deposit on his home, the "To Whom It May Concern" letter [Exhibit 4(v)] reflected that the Tripp Land Co. collected \$650.00 from him. [R. T. 742] Mr. Galbraith stated

that on March 2, 1962, the defendant had him sign a check in the amount of \$645.00 which the defendant immediately took back and destroyed [R. T. 749], and that the defendant requested Mr. Galbraith to tell the FHA that a friend had signed Exhibit 4(d), a statement submitted to the FHA that Galbraith had been saving \$25.00 to \$30.00 a month to purchase a home. Finally, the defendant wrote out Exhibit 4(aa), a note to remind Mr. Galbraith what he should tell the FHA. Exhibit 4(aa), stated: (1) a friend trying to help me signed the letter about me saving \$25.00 to \$30.00 per month to buy a home; (2) \$650.00 was deposited to buy a King home and returned to me after I cancelled the sale. [R. T. 750]

(c) Mrs. Reola Coleen Branum testified that the defendant visited her home in March 1962, at which time he showed her Exhibit 7(j), a letter dated October 27, 1961, to the FHA reflecting that the defendant had received cash in the amount of \$280.00 from the Branums for closing costs on their home. [R. T. 789] The defendant at that time informed Mrs. Branum that this letter had been sent, or was going to be sent to the FHA. The defendant explained that its purpose was to expedite the loan. In view of the fact that the letter was dated some five months before this conversation, it is reasonable to assume that the letter had been sent at that time.

The fact that the Branums executed a second trust note in no way mitigates the submission of the false document to the FHA as is argued by appellant.



(d) Finally, the testimony of James Roseman, salesman for the defendant Tripp, demonstrated that at no time during his employment did he ever receive a \$400.00 down payment from any of the purchasers to whom he sold Tripp homes. On the contrary, Mr. Roseman testified that the largest amount he remembers receiving was \$10.00. [R. T. 713] Mr. Roseman further testified that in October or November 1961 he had a conversation with the defendant concerning the closing of a particular sale. When Mr. Roseman informed the defendant that the delay was due to the purchaser's lack of money, the defendant instructed the witness to tell the purchaser "an old friend would loan her the money." At this juncture, the witness testified, the defendant pointed to himself. [R. T. 718]

All of the above described testimony is illustrative of the defendant's knowledge of the specific acts charged and is relevant and material to the defendant's culpability.

E. NO OBJECTION HAVING BEEN MADE
TO THE TESTIMONY OF MR.
BRADFORD REGARDING HIS PLEA
OF GUILTY, NO ERROR CAN NOW BE
CLAIMED.

An examination of the record fails to disclose that the appellant at any time objected to Mr. Bradford's testimony regarding his plea of guilty to the charges of the indictment. [R. T. 514]

As stated in Fiano v. United States, 271 F.2d 883 (CA 9,

1959), at p. 885:

"Apparently appellant saw nothing harmful in such evidence at the time of trial. He can not now complain, when he gave the trial court no opportunity to rule on the admissibility of those matters he now claims prejudicial to his cause. As succinctly stated by the Court in United States v. DeMarie (CA 7, 1955) 226 F.2d 783, 778: . . . in the absence of a valid objection made at the proper time, a party may not on appeal claim that the introducing of evidence was error."

Cf. Anthony v. United States (CA 9, 1950) 256 F.2d 50.

F. COUNTS SIXTEEN AND NINETEEN
ARE NOT DEFECTIVE FOR
FAILURE TO USE THE WORDS
"WILLFULLY AND KNOWINGLY"

Counts Sixteen and Nineteen are alleged to be defective for failure to use the words "willfully and knowingly". A reading on both of these counts of the indictment reflects that the defendant on certain dates uttered and published " . . . false statements which the defendant then and there well knew to be false. " [Emphasis added] The charge then sets forth the false statement and concludes in the last paragraph with the phrases, "Whereas, in truth and in fact, as the defendant then and there well knew", that such were not the facts. [Emphasis added] [C. T. 204, 207]

The very phrase "which the defendant then and there well knew to be false" contains within it an implication of guilty knowledge. As stated in Grant v. United States, 291 F. 2d 746, 749 (CA 9, 1961): "It is not necessary to allege that one 'knowingly' abetted as the word abet contains within it an implication of guilty knowledge." Similarly, in the instant case it would be surplusage and redundant to allege that the defendant knowingly "knew", when the indictment clearly enunciates that he submitted false statements which he knew to be false.

As stated in Haakinson v. United States, 238 F. 2d 775, at p. 780 (CA 8, 1956):

"We can see no legal substance in this technical contention. Under Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. A. 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.' The essence of the offense under the provision of 18 U. S. C. A. , Sec. 1010 that is here involved, is making, passing, uttering or publishing any statement, knowing the same to be false, and with this being done for the purpose of influencing in any way the action of the Federal Housing Administration."

Counts Sixteen and Nineteen clearly include the charge that the defendant submitted false statements knowing them to be false. Nor was the jury misled as to the elements necessary to be

proved by the appellee with respect to Counts Sixteen and Nineteen, for the court specifically instructed the jury that they must find that the acts were done knowingly and willfully. [R. T. 1031, 1033, 1034]

G. COUNTS FOUR AND TWENTY-FOUR
OF THE INDICTMENT STATE AN
OFFENSE AGAINST THE UNITED
STATES

Title 18 U. S. C., Section 1010 is not defective for failure to include the phrase "with intent that such loan or advance of credit be offered to or accepted by the FHA for insurance" The statute is written in the disjunctive and its language specifies several acts which are violations of the statute. The indictment properly charges one of the prohibited acts, namely, "Whoever for the purpose of influencing the action of the FHA, knowingly and willfully made, uttered and published . . . the following false statement . . . etc." This form has been approved in Gevison v. United States, 358 F.2d 761 (CA 5, 1966), at p. 763, where the court stated:

" . . . A reading of the indictment makes it plain that it meets the requirements of Rule 7(c), F. R. Criminal Procedure. It tracts the pertinent language of the statute, and apprises appellant of what he must be prepared to meet. It includes all of the essential elements of the offense and no

more is required under the statute. It is adequate for the purpose of a plea of former jeopardy and otherwise fully meets the standards required by the authorities. (Case cited omitted)

The gravamen of the offense under the applicable portion of 18 U. S. C. Section 1010 is the uttering of a false statement with the intent to influence the F. H. A. The indictment sets out the detail of the alleged false statement, that the false statement was wilfully and knowingly made and passed for the purpose of influencing the action of the F. H. A. "

That this is the clear import of Courts Four and Twenty-Four under review is unmistakable. [C. T. 190, 213]

H. THE PROSECUTING ATTORNEY
COMMITTED NO ERROR IN CLOSING
ARGUMENT

Appellant argued that the government attorney's characterization in closing argument of the defendant's statement to the F. B. I. as being "lies" constituted prejudicial conduct so as to deny defendant a fair trial. [R. T. pp. 864-865]

It is abundantly clear that the comments of counsel are not evidence in the case. [R. T. p. 1016] The jury's responsibility of weighing the defendant's statement to the F. B. I. against the plethora of other evidence introduced at the trial was not usurped

by the government's attorney characterization of the statement. Certainly there are ample contradictions between defendant's statement and the other evidence from which the jury could draw a similar conclusion of its own. An examination of the defendant's statement vis-a-vis the other testimony is examined in Section C, subsection II of appellee's brief.

The interpretation that the defendant lied to the F. B. I. was not without foundation as is illustrated from the inconsistencies with other witnesses' testimony cited above. The court in commenting on appellant's claim stated:

"This is his interpretation so he is entitled to do that in his argument. The jury will decide whether he did or did not. You will have to cover it in your argument. It is his interpretation and it is proper." [R. T. p. 865]

Although appellant objected to this characterization of his statement by the appellee, no motion for mistrial or request made that the jury be admonished to disregard any such argument was made by appellant. No instruction to that effect was offered by appellant, and no objection to the absence of such an instruction was interposed. Thus, if any prejudice did exist, which appellee denies, it is submitted such error should be deemed waived.

Devine v. United States (C. A. 9, 1960)

278 F. 2d 552, 556.

Patterson v. United States (C. A. 8, 1966)

361 F. 2d 632, 638.

I. THE PURPOSE OF THE CONSPIRACY
WAS TO OBTAIN FHA FEDERALLY
INSURED LOANS AND CONTINUED
AFTER MARCH, 1962

The appellant argued that the conspiracy terminated when the F. H. A. mailed letters asking purchasers to come into its office to discuss their loans. The appellant fixed this time as March 1962. In support of this termination point, appellant argued that everything that followed it was done by the defendant to cover up the crime rather than to further it.

A plain reading of the conspiracy count of the indictment clearly indicates that all of the actions charged were directed toward the accomplishment of the expressed purpose of the conspiracy, namely, to influence the action of the FHA so as to obtain insured loans on the defendant's properties. [C. T. p. 184] The conforming of the defendant's records with those submitted to the FHA was as crucial in the scheme to influence the action of the FHA as was the original presentation of the false data. Equally important in the defendant's plan to influence the action of the FHA were his efforts to obtain the complicity of the purchasers by having them lie to the FHA if questioned.

The case of Kruelewitz v. United States, 336 U. S. 440, relied upon by appellant to support his argument is clearly distinguishable. There the object of the conspiracy to violate the White Slave Act had already occurred or passed at the time the alleged conversation attempted to be introduced into evidence

occurred. Not so in the instant case where the object of the conspiracy to obtain federally insured home loans was still actively being pursued by the appellant. In another important area the Kruelwitch case is distinguishable. In Kruelwitch the questionable conversation was "made in the petitioner's absence and the Government made no effort whatever to show that it was made with his authority." (p. 336 U. S. 442). The acts attributed to the appellant in this case were performed by him; no attempt was made to rely on any hearsay declaration made outside of his presence though attributed to him as was made in Kruelwitch.

The testimony at trial illustrates that the objective of the conspiracy to obtain FHA insurance on his home sales continued after March 1962.

Mr. George E. Glover, Vice President and Branch Manager of T. J. Bettes Co., testified that as late as May 1962 he went with the appellant to appellant's office where the witness copied information from Mr. Tripp's files relating to down payments, rental payments, and closing costs on home sales. Mr. Glover testified that he informed Mr. Tripp that this information was being obtained for the FHA. [R. T. 243-247]

Mr. Glover further testified that the part of the information obtained from the appellant in the early part of May 1962 was incorporated in a letter to the FHA dated May 11, 1962, regarding the application of Arnolfo Cardona to obtain an FHA loan. The closing paragraph of the May 11, 1962, letter expressly

indicates that as late as that date the FHA was still processing loans on buyers' applications containing false information which had been furnished by the appellant. [Exhibit 21] Mr. Glover also testified that Exhibit 21 represented only one of other similar letters sent to the FHA on the basis of information obtained from the appellant in May 1962.

As stated in Grunerwald v. United States, 353 U. S. 391 at p. 405:

"... a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime."

In the instant case the central objective of the conspiracy were of a continuing nature and were never attained.

As stated in United States v. Kissel, 218 U. S. 601 (1910):

"[W]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. ... If [the conspirators]

continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success." 218 U.S. at 607-8.

Here the plan was to obtain federally insured loans on defendant's properties. In order to successfully prosecute the plan to a successful conclusion, it was essential that defendant's records be conformed to those of the FHA and that defendant obtain the continued cooperation of the purchasers. Absent proper records and compliant purchasers, defendant's scheme would fail; that is, these acts were in pursuance of the plan. The conspiracy necessarily continued since the scheme had not been abandoned, nor was it yet a success.

VI

CONCLUSION

The evidence supports the conviction. No error was committed by the District Court in its rulings on the respective motions and admissibility of evidence, therefore, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT

No. 20553 ✓

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DE PINTO,

Appellant,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy
of the Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COM-
PANY, and ALBERT J. DOIG,

Appellees.

**Petition of Appellant, Angus J. De Pinto,
and Intervenor-Appellant, James P. Donohue,
for Rehearing**

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FILED

MAR 22 1967

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MAR 27 1967

No. 20553

In the
United States Court of Appeals
For the Ninth Circuit

ANGUS J. DE PINTO,	} <i>Appellant,</i>
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<i>Intervenor-Appellant,</i>	
vs.	
PROVIDENT SECURITY LIFE INSURANCE COM- PANY, and ALBERT J. DOIG,	} <i>Appellees.</i>

**Petition of Appellant, Angus J. De Pinto,
and Intervenor-Appellant, James P. Donohue,
for Rehearing**

COME NOW, ANGUS J. DE PINTO, appellant, and intervenor-appellant, JAMES P. DONOHUE, and, pursuant to Rule 23 of the Rules of this Court, respectfully petition for a rehearing of this cause, and request that, upon such rehearing, the judgment of this Court shall be modified as follows:

A. Trial Judge Disqualified.

The judgment of the lower Court should be reversed and the cause remanded with instructions to grant a new trial before a United States District Judge, other than the Honorable George H. Boldt. In its opinion, this Court ignored the fact that when DePinto filed an Affidavit of Bias or Prejudice against Judge Boldt, on or about November 20, 1964, pursuant to 28 U.S.C.A. § 144, Judge Boldt was thereby deprived of all power and authority to proceed in this action. The cases cited by appellants at pages 58 to 66 of their Opening Brief fully support this position. DePinto was deprived of a fair trial as guaranteed by the Fifth Amendment to the Constitution of the United States.

B. Judgment Excessive.

The cause should be remanded to the lower Court with instructions to reduce the judgment in one or more of the following respects:

- (1) The judgment should be reduced to 57½% of \$314,794.19, namely \$180,856. This Court, in considering the issue with respect to the cancellation of 42½% of the common stock of United, formerly held by American Security and the Duhames, stated that, "While DePinto has cited a number of decisions in support of his position on this branch of the case, we do not find them persuasive under the special circumstances of this case." This Court erred in assuming that there are "special circumstances" which make well-settled law inapplicable here. Under the terms of the merger agreement, Provident is prosecuting this action as a trustee for former United stockholders and can have no right of recovery greater than that enjoyed by the stockholders for whom the action is maintained. Such stockholders, if they sued in their own right, would not be entitled to

recover attorneys' fees and would not be entitled to damages in excess of 57 1/2% of the value of the assets transferred from United to American.

(2) The judgment should be reduced by the sum of \$100,000, paid by the Duhames as consideration for a covenant not to sue. As this is a diversity action, the lower Court was required to recognize and apply the settled law of the State of Arizona, namely that a payment made to a plaintiff by one joint tort-feasor must be credited upon any judgment rendered against another joint tort-feasor in an action instituted against both of them. There is no legal principle, recognized by the Courts of Arizona, or any other state, which permits the plaintiff, or the Court, to "allocate" the payment to any one or more "claims" against the joint tort-feasors, when such payment is made on account of a release or a covenant not to sue with respect to all "claims". Furthermore, in the case at Bar, there was only one claim against DePinto and Duhamé for breach of their fiduciary duties as directors of United. The damages flowing from such breach of duty constitute but one "claim". And, further, if the demands for \$177,863.84, and \$60,695.60, injected into the pretrial order, may be treated as "separate claims", it is, nevertheless, clear that they had long since ceased to exist as viable claims for the reasons that:

(a) such claims were not revived or pursued "within a reasonable time" as provided in the judgment of this Court in *Niesz v. Gorsuch*, 295 F.2d 909 (9th Cir. 1961);

(b) any "claims" other than for \$314,794.19 were long since barred by limitations when the Trial Court attempted to inject claims of \$177,863.84 and \$60,695.60 into the pretrial order; and

(c) the promissory notes and accrued interest of \$87,626.88, referred to in footnote 7 at page 16 of this Court's Opinion, and which was included in the judgment

of \$314,794.19, represented money loaned by United to United Finance Corporation, and which was included in the alleged claim of \$177,863.84.

(3) The judgment should be reduced to not more than the sum of \$308,000, for the reason that, by agreement between plaintiff and defendants Kelly, Dunn and Jenkins, said defendants were released of all liability in excess of \$308,000. By its Opinion, this Court disregarded the fact that, under the law of the State of Arizona, the release of one joint tort-feasor releases all.

C. Further Proceedings Required.

This Court has rejected DePinto's contentions with respect to the surrender and cancellation of 42½% of United's stock because of its view that the remaining stockholders might not, as a result thereof, be "unjustly enriched". This Court completely overlooks the fact that, to the extent of the value of such stock, the liability of all defendants herein was reduced *pro tanto*.

Upon remand, the Trial Court should be directed to retain jurisdiction of this cause, and upon satisfaction of the judgment by DePinto, a determination should be made of the portion thereof (including the \$100,000 payment by the Duhames) which is available for distribution to the former stockholders of United under the terms of the merger agreement. The Trial Court should be further directed to require Provident to pay over to DePinto 42½% of that sum. As hereinabove noted, it is the law of the State of Arizona that a joint tort-feasor is entitled to credit for any sums paid by another joint tort-feasor on account of his joint liability. The 42½% of the stock of United, which has been cancelled, can be worth no less than the sums which would otherwise have been payable, from the net proceeds of the judgment herein (including the \$100,000 payment by the Duhames) to the holders of such stock, had the same not been surrendered and cancelled.

It is suggested that this Petition be referred to, and determined by, this Court *en banc*.

Respectfully submitted,

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JOSEPH S. JENCKES, JR., one of the attorneys for appellant Angus J. DePinto hereby certifies that, in his judgment, the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

JOSEPH S. JENCKES, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES EMANUEL WHITE and
JOHN LEWIS

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

SHELBY R. GOTT,
Assistant U. S. Attorney,

FILED

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JUL 7 1967

NO. 20566

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IN THE UNITED STATES COURT OF APPEALS
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CHARLES EMANUEL WHITE and
JOHN LEWIS

APPELLANT

vs.

UNITED STATES OF AMERICA

APPELLEE

APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant John Lewis to be guilty of the first three counts of a five-count indictment and adjudging appellant Charles Emanuel White to be guilty of Count One only of the same five-count indictment, following trial by jury. (C.T. 50, 51).

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

Appellant John Lewis was charged in Counts One, Two and Three and Charles Emanuel White was charged in Counts One and Four of a five-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division, at San Diego, California, on January 20, 1965.

The first count alleged that appellant White, and Appellant Lewis, Edna Louise Nesmith, Swindell McNeal and others unknown conspired to import narcotic drugs into the United States from Mexico, contrary to Title 21, United States Code, Section 173 (C.T. 2). In furtherance of the conspiracy three overt acts were alleged.

The second and third count alleged that Swindell McNeal knowingly imported twenty seven ounces of Heroin and one-half ounce of Cocaine respectively into the United States from Mexico, contrary to Title 21, United States Code, Section 173, and further alleges that John Lewis knowingly aided and abetted the commission of the offense (C.T.2).

Count Four alleged that Edna Louise Nesmith knowingly imported four grams of Heroin and one gram of Cocaine into the United States from Mexico, contrary to Title 21, United States Code, Section 173, and further alleges that appellant Charles Emanuel White knowingly aided and abetted the commission of the aforesaid offense (C.T. 2).

^{1/}

"C. T." means Clerk's Transcript.

Count Five alleged that Edna Louise Nesmith, with intent to defraud the United States, knowingly smuggled one marijuana cigarette into the United States from Mexico, and further alleges that appellant Charles Emanuel White knowingly aided and abetted the commission of the aforesaid offense. (C.T. 2)

Jury trial of appellants John Lewis and Charles Emanuel White commenced on May 4, 1965, before United States District Judge Fred Kunzel, on counts One through Four only. On May 7, 1965, appellant John Lewis was found guilty as charged in Counts One, Two and Three, (C.T. 50), while appellant Charles Emanuel White was found guilty of Count One only. (C.T. 51). Judgment of acquittal as to Count Four was granted by Judge Kunzel after the close of the trial prior to charging the jury. (R.T. 361).

Thereafter, on May 28, 1965, appellant White was committed to the custody of the Attorney General for twenty years and fined the sum of \$20,000. on Count One. (C.T. 55). On the same date, appellant Lewis was sentenced to twenty years and fined the sum of \$20,000. on each of counts One, Two and Three, with the period of confinement only to run concurrent and the fine to run consecutive, making the total sentence twenty years and a fine of \$60,000. as to appellant Lewis. (C.T. 56).

Appellants White and Lewis subsequently filed a notice of appeal on June 4, 1965. (C.T. 57, 59).

2/

"R.T." means Reporter's Transcript.

III.

ERROR SPECIFIED

The errors specified by appellant are paraphrased as follows:

- A. That the indictment was defective.
- B. That there was an illegal search and seizure.
- C. That there was a violation of the due process clause of the Constitution.
- D. That inadmissible prejudicial hearsay evidence was admitted.
- E. That the Prosecutor was guilty of misconduct through prejudicial statements in the argument.
- F. That the jury was not properly instructed.
- G. That evidence admitted in violation of the rules laid down in the cases of Escobedo, Massiah and Miranda.

IV.

STATEMENT OF THE FACTS

On November 8, 1964 at 7:00 P.M., appellant Charles Emanuel White entered the United States at San Ysidro, California, coming from Tijuana, Mexico (R.T. 60). He was driving an automobile he had rented at the Los Angeles Airport (R.T. 65). His passenger was Edna Louise Nesmith (R.T. 65, 221). He appeared to Inspector Collinsworth to be "drinking or possibly was under the influence of drugs". A bottle of cough syrup containing codeine was in the glove compartment (R.T. 60) and Miss Nesmith had a package containing eight small cellophane bags of Heroin and two tinfoil wrapped packages of Cocaine. (R.T. 90, 218-219). White had given her these packages just

after crossing the border and upon being referred to secondary for further search (R.T. 219, 257, 260). Appellant White was a similar piece of tinfoil in his pocket (R.T. 99).

In appellant White's Mexican briefcase in the trunk was \$6400.00 (R.T. 80, 87). Appellant White was certified as addicted to and under the influence of Heroin by Doctor Paul R. Salerno, M.C. (R.T. 304-306). Edna Nesmith appeared to Doctor Salerno to be a user and under the influence of Cocaine (R.T. 307-308). Sniffing of Cocaine was admitted to by Nesmith, (R.T. 261, 278).

Under the windshield wiper of the rented car driven by appellant White, was ticket #2067 from the Foreign Club Parking Lot in Tijuana (R.T. 69, 80). White had a corresponding stub in his pocket. Appellant White also had a copy of a Hertz rental agreement in his pocket showing a New York address and a \$50.00 deposit having been made on the car. (R.T. 102). White also had two airplane tickets on his person in the name of Miss E. Nesbitt and J. Smaltz (R.T. 99).

Nesmith had a telegram on her person sent from Detroit, saying in effect that her brother was ill and to come at once (R.T. 98).

An hour later the same date, Swindell McNeal entered the United States alone from Tijuana, Mexico, at the same Port of Entry at San Ysidro, California, driving an automobile (R.T. 64) he had rented at the San Diego Airport (R.T. 19, 132). Under the rear seat was found twenty-seven packages containing 23.6 ounces of Heroin and approximately one-half ounce of Cocaine. These

packages were found under the rear seat in two blue bags (R.T. 57, 68).

McNeal had departed from New York with appellant John Lewis the previous evening (Nov. 7, 1964) at 6:00 P.M., by plane for Detroit (R.T. 122).

McNeal was a presser in a cleaning plant and, in addition, as an agent he was supposed to get 10% of a couple of acts in partners with another (R.T. 187).

He began driving Lewis around (R. T. 129) and Lewis told him two weeks before to be ready for a trip to California (R.T. 119). On the morning of November 7, 1964, (R.T. 116, 117) Lewis told McNeal to get ready (R.T. 116, 117). He had only pocket change, (R.T. 133). Lewis gave him some money (R.T. 134).

They went to the New York Airport in Lewis' rented car where he turned the car in. (R.T. 123). Lewis bought tickets for them to Detroit, Michigan. Lewis rented a car to use in Detroit (R.T. 124). They stayed at 5957 Bush Street with Lewis' wife and daughter or step-daughter. Lewis made phone calls in McNeals' presence. One conversation was "you know I have a 5:00 p.m. appointment with somebody. Every time there is a messup." (R.T. 125, 126). He received a phone call where McNeal overheard Lewis say "Why can't you get a flight. There's a flight at all times of night." (R.T. 128).

The next morning, they left for Chicago, Illinois, with tickets Lewis purchased for them. They then flew from Chicago to Los Angeles where Lewis rented a car (R.T. 131) at Avis on a credit card at 12:12 P.M., using an address in Dallas, Texas. (R.T. 19).

Lewis bought a pair of pliers and disconnected the speedometer on the

rented car (R.T. 132). They proceeded to the San Diego Airport where Lewis gave \$50.00 to rent a car at Avis. (R.T. 132). McNeal rented a car at Avis at 3:36 P.M. (R.T. 23-27).

Lewis had rented cars there before. Ann Allison of Avis remembered him since she was also from Texas (R.T. 30).

Lewis and McNeal went to the Foreign Club Parking Lot in Tijuana, Mexico. (R.T. 135, 33, 40). Lewis left and returned twice. (R.T. 137). The Foreign Club parking lot ticket #2059 was placed on the windshield and McNeal had the stub in his pocket (R.T. 16) together with the Avis rental agreement showing his employment as Salaam Music Company, New York, N.Y. There were 25 parking tickets to a package at the Foreign Club Parking Lot (R.T. 43).

McNeal saw Otis Johnson give John Lewis \$4,500. in his apartment in New York during the week before their arrest (R.T. 144, 146).

Appellant White told McNeal at the jail that he was to meet John Lewis (R.T. 161).

Appellant Lewis came back to the Foreign Club Parking Lot, and awakened McNeal where he was sleeping in the car, "bawled him out" for not being ready, then guided McNeal up into the hills where he transferred the Heroin and Cocaine from his car to the automobile driven by McNeal (R.T. 136). He ordered McNeal to follow him until they neared the border, then McNeal was to proceed ahead. (R.T. 139). McNeal drove ahead and at the border, about three cars got between them, but not directly behind him (R.T. 140).

McNeal was then found with the narcotics in the car (R.T. 67, 68). Lewis was arrested in Detroit near where his wife lives on January 18, 1965. (R.T. 287).

Appellant White and Nesmith were driven to the Airport by White's brother-in-law, Otis Johnson (R.T. 221, 222). On the way, White told Johnson he hoped John would be there. (R.T. 247).

Before they departed, Nesmith received a telegram from Detroit addressed to Nesmith saying her brother was ill. Her brother was not ill. White told Nesmith that John Lewis arranged for the telegram to be sent. (R.T. 227-230).

Appellant White bought the tickets under the names of E. Nesbitt and J. Smaltz. They missed the 10:00 o'clock plane and left at 12:00 noon (R.T. 230). Appellant White was given the money (\$6,400.00) by Otis Johnson and Otis told White somebody else was to bring something back (R.T. 234). The money was placed in the Mexican briefcase under a shirt and tie (R.T. 249).

They arrived in Los Angeles at 3:30 or 4:00 P.M. (R.T. 251). Appellant White rented a car and drove fast and straight to the Foreign Club Parking Lot in Tijuana (R.T. 231). He went into the bar, returning shortly and said "I missed him."

Appellant White wanted to provide Nesmith's lawyer (R.T. 246) while Lewis arranged for McNeal's lawyer and tried to get him to use the same lawyer as Lewis had. (R.T. 171).

Appellant Lewis prepared a story in which McNeal would try to place all the blame on appellant White (R.T. 164, 168-169), and said he would

rehearse him over and over (R.T. 169) Lewis tells McNeal, "you've got a clean record, you'll come out Scot-free." (R.T. 164).

V.

ARGUMENT

A. THE INDICTMENT IS NOT DEFECTIVE.

1. Alleged Formal Defects do not Determine the Sufficiency of Indictments.

The sufficiency of an indictment is to be determined on the basis of practical rather than technical considerations. Medrano v. United States , (9th Cir. 1960)

"the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently appraises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Hagner v. United States , 285 N. S. 427 (1932)

Sterling v. United States , 333, F.2d 443 (9th Cir. 1964)

Heaton v. United States , 353 F.2d 288 (9th Cir. 1965)

It is sufficient if the indictment alleges the offense substantially in the words of the statute, where the statute sets forth all the essential elements of the crime. If the indictment alleges an offense, and identifies

the particular conduct upon which the charge is based to the extent necessary to protect appellant from double jeopardy, and tells him what he must be prepared to meet, it is sufficient.

Rivera v. United States, 318 F.2d 606 (9th Cir. 1965)

2. The Indictment was Clearly Sufficient to Charge a Conspiracy.

" In an indictment for conspiracy to commit an offense in which the conspiracy is the gist of the crime . . . it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy in charging such a conspiracy certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary."

Wong Tai v. United States, 273 U. S. 77 (1927)

Williamson v. United States, 310 F.2d 192 (9th Cir. 1962)

Appellant alleges that the indictment was defective because it did not allege that he had knowledge that the narcotics were imported "contrary to law."

Title 21, Section 174 of the United States Code is applicable only to knowing transactions in narcotic drugs, knowingly imported contrary to law. Appellants could hardly avoid knowing from the indictment that a charge of violating this section was a charge that he had acted contrary to law, where the alleged offenses involve illegal importation.

Fiano v. United States, 291 F.2d 113 (9th Cir. 1961)

Under Section 174 of Title 21, proof of mere possession permits a jury to infer knowledge of illegal importation, and a finding of such knowledge is practically required when possession of Heroin is shown.

Stein v. United States, 313 F.2d 518 (9th Cir. 1962)

Count One of the indictment in the instant appeal is substantially identical with the count upheld in the Stein case, supra. It was held in that case at 520 that the count was sufficient in that all of the essential elements were either alleged or necessarily implied.

3. The Ninth Circuit has Specifically Rejected two cases Relied Upon by Appellant.

In Calhoun v. United States, 257 F.2d 673 (7th Cir. 1938), and Robinson v. United States, 263 F.2d 911 (10th Cir. 1959), both cited by appellant at page 7 of his brief, have been specifically rejected by the 9th Circuit as being in conflict with the modern views of the nature and purpose of an indictment, and as being contrary to the rule laid down by the United States Supreme Court in Wong Tai v. United States, supra., and as discussed by the 9th Circuit cases of Williamson v. United States, supra, and Medrano v. United States, supra. It is interesting to note that these latter involved violations of Title 21, Section 174, United States Code, and indictments similar to that in the instant case. In Calhoun, supra, the petitioner claimed a defect in the indictment where the uniawfulness of the knowing

importation was not alleged, whereas in Robinson, supra, the claimed defect was failure to allege knowledge. See Stein v. United States, 313 F. 2d 518 (9th Cir. 1962) and Palomino v. United States, 318 F.2d 613 (9th Cir. 1963). The Palomino case would seem to directly control the question of the alleged insufficiency of the indictment in this appeal. In that case, the facts were substantially similar, the prosecution was under the same statute, and the indictment challenged was phrased in terms of the statute as here, without specifically alleging that the narcotic drug was imported contrary to law, or that Palomino knew of such illegal importation.

At page 615 the Court said

"on the authority of Medrano v. United States, 9 Cir. 285 F.2d 23, 26, we conclude that such an indictment is not fatally defective... The sufficiency of an indictment is to be determine on the basis of practical rather than technical considerations, and it is not the law that to charge conspiracy to commit an offense, all the elements be alleged . . ."

Fiano v. United States, 291 F.2d 113 (9th Cir. 1961).

Here all essential elements were either alleged or are necessarily to be implied from what was set forth in the statute itself. Appellant was at all times represented by competent and experienced counsel, and there is no allegation that appellant was actually misled or prejudiced by the language used.

B. NO EVIDENCE WAS ADMITTED FROM AN ILLEGAL SEARCH AND SEIZURE.

Appellant Lewis apparently complains of a search and seizure by local officers of his apartment in New York.

This is a moot question, since no evidence was introduced that came from his apartment in New York.

Appellant points to no place in the record that even hints any such evidence was used.

See United States v. Wilson, 368 F.2d 842 (2nd Cir. 1966).

C. THERE WAS NO VIOLATION OF DUE PROCESS.

Appellants also argue the prosecution knowingly used false testimony or somehow permitted such testimony to be used. Again appellant points to no specific record where the purported false testimony appears.

Appellant Lewis is apparently still concerned about an alleged seizure of private records and documents from his apartment in New York, that prevented him from defending his case. He further "wildly" alleges these papers were not produced upon demand by the United States Attorney.

Again, there is no record of such papers being seized and no record of any demand on the United States Attorney.

Further, if they are to be used only for the purpose represented, that is just to show appellant Lewis and McNeal in their proper perspective, the relevance would be doubtful.

D. NO ADMISSIBLE EVIDENCE WAS ADMITTED.

1. The Hearsay Testimony of McNeel and Neamith Concerning White's and Lewis' Statements to them were Limited in Application to the Declarant by the Trial Court's Instructions.

Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove declarant's participation. The Court must make it clear at the time of admission and by it's instructions that the evidence is limited to the declarant only.

Lutwak v. United States, 344 U. S. 604 (1952)

Each defendant must be connected with the alleged conspiracy by evidence independent of the statements of co-conspirators before the latter are admissible against him.

Hansen v. United States, 326 F.2d 152, 155 (9th Cir. 1963)

After the prima facie showing of conspiracy and concert of action, it is proper to admit testimony concerning conversations of a witness with a co-conspirator outside the presence of the defendant.

Shibley v. United States, 237 F.2d 327(9th Cir. 1956)

Every act or declaration of each member of a conspiracy done or made in furtherance of said conspiracy is considered the act and declaration of all the conspirators and is evidence against each of them.

Barrett v. United States, 171 F.2d 721, 722 (9th Cir. 1949)

The co-conspirator's assertion doctrine has developed as a reasonable extension of the rule excepting admissions of a party from the hearsay prohibitions

"Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party."

quoting Lutwak v. United States, *supra* at p. 617. Such assertions constitute vicarious admissions chargeable against all conspirators.

Wolcher v. United States, 233 F.2d 748, 750 (9th Cir. 1956)

For a co-conspirator's declaration to avoid being classed as hearsay three prerequisites must be met:

- 1) The declaration must be in furtherance of the conspiracy;
- 2) it must have been made during the pendency of the conspiracy;
- 3) there must be independent proof of the existence of the conspiracy and of the connection of the declarant and defendant with it.

Carlo v. United States, 314 F.2d 718, 735 (9th Cir. 1963)

All testimony at any trial relating to prior statements or acts is given subsequent to any alleged conspiracy. But this alone does not make it inadmissible. So long as the testimony relates to events occurring prior to termination of the conspiracy, it is fundamental that the testimony of one conspirator is admissible as to the statements of all the conspirators where

it relates to communications made during and in the course of the conspiracy.

Murray v. United States, 250 F.2d 489, 491 (9th Cir. 1957)

The rule is well established that the declarations of a conspirator may be used against another conspirator, not present, on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule.

United States v. Accardi, 342 F.2d 697, 700 (2nd Cir. 1965)

Lutwak v. United States, 344 U. S. at p. 617

Such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy.

The jury was periodically instructed throughout the trial as to the foregoing limitations and then properly instructed on the law of conspiracy at the close of the trial. (R.T. 388-393). The hearsay portion of the instruction clearly sets forth the law on this point. (R.T. 392-393).

In the case at hand, it is clear that the Court was proceeding with caution. Judge Kunzel told the jury "you must view with caution any testimony concerning a statement supposedly made outside the Courtroom by a defendant." (R.T. 381). The Court also instructed on witnesses who have "self-interest" or who are "accomplices". (R.T. 383).

E. THE PROSECUTOR WAS NOT GUILTY OF MISCONDUCT THROUGH PREJUDICIAL STATEMENTS IN THE ARGUMENT.

In looking over the argument for the government, it appears to consist of approximately 33 pages. The only statement of all these mentioned by

appellants that appear worthy of consideration in this category is the statement "the government knows what the truth is." (R.T. 367).

Taken out of context, it has the appearance of an unfortunate utterance but taken in its intended light of emphasizing the truthfulness of McNeal and punishment for perjury if he should be found lying, while not a statement that would inspire pride of authorship, it is not so prejudicial as to require reversal.

The statement is a very small part of a rather lengthy argument. The statement was immediately withdrawn and the jury instructed to disregard the remark. The remaining portion of the argument appears to be supported by the evidence. The Court also instructed the jury that statements and arguments of counsel are not evidence. (R.T. 378, 381).

The jury was told by appellee's counsel that "you are the sole judge of the facts, so if I misquote any of the evidence, it is as you find it to be." (R.T. 323).

F. THE JURY WAS PROPERLY INSTRUCTED ON CIRCUMSTANTIAL EVIDENCE.

Appellant contends (at page 37 of appellant's brief) that the Trial Court erred in not instructing the jury that if circumstantial evidence can be reconciled with either the theory of innocence or the theory of guilt, the theory of innocence must be adopted. In other words, he contends that the proper instruction must state that the government cannot convict on circumstantial evidence unless it excludes every reasonable hypothesis other than that of

guilt.

This is not the law as enunciated by the United States Supreme Court, or as followed by the Ninth Circuit. The leading case is Holland v. United States, 348 U. S. 121 (1954). In that case, a similar instruction was requested by the defense and rejected. The court, in upholding the tenth Circuit's rulings, said at page 139,

"the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. Circumstantial evidence in this respect is intrinsically no different from testimonial evidence In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference in both the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

This is the position of the Ninth Circuit.

See Strangway v. United States, 312 F.2d 283 (9th Cir. 1962) cert. denied, 373, U. S. 903 (1963).

Appellant does not contend that improper instruction was given the jury concerning reasonable doubt, and as can be seen at pages 377 and 378 of the Reporter's Transcript, such instruction was fully given. Further, the Court properly discussed circumstantial evidence and its relationship to

reasonable doubt in clear language such as that approved in Holland, supra.

The instruction on possession was offered by counsel for the government (C.T.10) and was objected to by appellant White's counsel. (R.T.299,300)

The Court refused to give the instruction and no further objection was raised by either counsel (R.T. 321).

On the facts in this case there is no plain error.

Appellant's remaining argument on instructions appears to carry little merit.

G. NO EVIDENCE WAS ADMITTED IN VIOLATION OF THE RULES
LAID DOWN IN ESCOBEDO, MASSIAH, AND MIRANDA.

Appellant contends that his rights under the Fourth Amendment, allowing exclusion of evidence obtained by an illegal search and seizure, were violated. There is nothing in the record to substantiate this claim. Appellant bases his contention on the fact that evidence of a conversation between appellant Lewis and McNeal was admitted at trial. The conversation took place in Lewis' apartment in New York, after McNeal had been arrested, and later released. In support of his contention that this evidence was illegally obtained, petitioner cites the case of Silverman v. United States, 365 U. S. 505 (1960), which held that statements overheard by an officer at a time when he was trespassing upon defendant's premises, must be excluded under the Fourth Amendment.

The facts of that case are clearly distinguishable from the appeal at hand. In Silverman, supra, the officers committed a physical trespass by

inserting a spike mike into defendant's wall. In the instant case, however, there was no trespass at all. McNeal was freely admitted to the premises by his associate, Lewis. The Court in Silverman specifically limited its holding to cases of actual trespass.

Next, appellant seeks to find a violation of the Sixth Amendment right to counsel in this case, alleging that it is parallel to Massiah v. United States, 377 U. S. 201 (1963). In Massiah, the defendant was arrested, then released on bail. While he was out on bail, the authorities surreptitiously obtained incriminating statements from him. This was held to be a violation of Massiah's right to counsel, as he had already been indicted. McNeal was not sent to Lewis's apartment by officers. In the instant case, appellant Lewis had not yet been arrested, indicted, or in any way deprived of his freedom of movement, at the time he made the statements. He was merely a suspect.

The Trial Court considered Massiah as inapplicable (R.T. 157). Appellant admits that this case will not fit within the rule of Massiah, but attempts to apply it by analogy by the further step of grafting on a mistaken interpretation of Escobedo v. Illinois, 378 U. S. 478 (1964). It is true that Escobedo broadened the protection afforded by Massiah, but by no stretch of the imagination can that case be given the interpretation sought by appellant. Petitioner contends that the right to counsel should extend to appellant Lewis because the investigation had begun to "focus" upon him. It is true that under Escobedo the right to counsel may attach before indictment. It attaches

when a police investigation is no longer a general inquiry, but has begun to focus on a particular suspect, in police custody. What appellant fails to consider is the final element of custody, which is indispensable even under Escobedo. It is clear that Lewis was not and had not been in custody at the time he made the statements admitted into evidence.

Appellant makes a final attempt to find a constitutional violation when he alleges that Lewis was denied his right under the Fifth Amendment not to incriminate himself. In support thereof, appellant cites Miranda v. Arizona, 384 U. S. 436 (1966). Petitioner claims that Lewis was denied this right because he was not warned of his right to silence prior to giving the incriminating statements in his apartment. This contention can be easily disposed of on two grounds.

First, Miranda, like Escobedo, requires more than the focusing of the investigation on a particular suspect. It requires that the suspect be in custody or be deprived of his freedom of action. Clearly, that was not the situation in this case.

Second, the rules established in Miranda are not to be applied retroactively to cases where trial began before the decision in Miranda. This was such a case.

Pembroke v. Wilson, 370 F.2d 37 (9th Cir. 1966)

Spigner v. United States, 369 F.2d 686 (9th Cir. 1966)

Collins v. Wilson, 368 F.2d 995 (9th Cir. 1966).

Also, the record is clear that McNeal was not an agent of the government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



SHELBY R. GOTT

N O. 2 0 5 8 7

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vs.

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Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

JAN 30 1967

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND
FACTS DISCLOSING JURISDICTION

On June 30, 1965, the Federal Grand Jury for the Southern District of California returned an Indictment in eight counts. Count One of the Indictment charged the appellant with knowingly receiving, concealing, and facilitating the transportation and concealment of marihuana, in violation of Title 21, United States Code, Section 176a. Count Two of the Indictment charged the appellant with knowingly selling, to an undercover assistant of the Federal Bureau of Narcotics, marihuana which had been imported into the United States contrary to law, in violation of Title 21, United States Code,

Section 176a [C. T. 2, 3]. 1/

Only Counts One and Two relate to appellant. There were several other defendants named in those and other counts of the Indictment. These were: Gary Lee Tronmpeter, Alan Hann Oelke, Leon T. Graves, and John Edward Oelke. Tronmpeter and Alan Oelke were the only defendants named in Counts One and Two, other than appellant. Pursuant to pleas of not guilty by all defendants, trial by jury was set for August 2, 1965 [C. T. -A. 33, 62]. 2/

On August 2, 1965, prior to empanelling of the jury, defendant Gary Lee Tronmpeter changed his plea to guilty. Also prior to empanelling of the jury, counsel for appellant DeJong moved for a severance and separate trial for his client, on the ground that Counts One and Two of the Indictment, in which DeJong was charged, were based upon transactions unrelated to the other counts [R. T. -A 17-21]. 3/ This motion was denied without prejudice. Thereafter a jury was empanelled and sworn to try the defendants then remaining, who were Alan Oelke, John Oelke, Leon T. Graves, and appellant DeJong [R. T. -A 26-44].

Subsequent to empanelling and swearing of the jury as aforesaid, the defendant Alan Oelke changed his plea, then pleading

1/ "C. T. " refers to Clerk's Transcript.

2/ "C. T. -A" refers to the Clerk's Transcript in a related appeal, Oelke and Graves v. United States, No. 20864, pending before this Court. This transcript contains material relevant to both appeals, which is missing from the present transcript.

3/ "R. T. -A" refers to the Reporter's Transcript in the related appeal, Oelke and Graves v. United States, No. 20864, pending before this Court.

guilty to Counts Two, Seven and Eight of the Indictment [R. T. -A 57]. Since the activities of Alan Oelke appeared to the Court to be the only connecting link between the offenses charged to John Oelke and Graves (charged in Counts Seven and Eight of the Indictment), and the offenses charged to appellant DeJong, the Court thereafter, on August 3, 1965, granted appellant DeJong's motion for a severance in the interests of justice for all defendants concerned [R. T. 4-14]. ^{4/} The jury already empanelled was then used to try appellant DeJong separately from any other defendant named in the Indictment.

On August 5, 1965, the jury returned a verdict, finding appellant guilty of the violation of Title 21, United States Code, Section 176a, as charged in Counts One and Two of the Indictment [R. T. 497, 498].

On August 31, 1965, after the Court denied a motion for a new trial [C. T. 83], appellant was sentenced to a term of five years, pursuant to Title 21, United States Code, Section 176a [R. T. 506].

Appellant filed a timely notice of appeal on September 8, 1965 [C. T. 88].

Jurisdiction of the District Court was based on Title 21, United States Code, Section 176a, and Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

^{4/} "R. T. " refers to Reporter's Transcript.

STATUTES INVOLVED

Title 21, United States Code, Section 176a, reads as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to

have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

III

QUESTIONS PRESENTED

1. Was appellant deprived of his right to jury trial, either by virtue of the fact that his peremptory challenges to the jury panel were exercised jointly with two other defendants who were subsequently withdrawn from the trial, or by virtue of the Court's failure to discharge the jury after withdrawal of such defendants?

2. Did the Court err in failing to direct a verdict of acquittal on the ground that the evidence was insufficient to show his involvement in a sale of marihuana? Was there sufficient evidence that appellant facilitated concealment, transportation and/or sale of marihuana?

3. Did the Court err in admitting to evidence expert testimony by an agent of the Federal Bureau of Narcotics as to the probable source of the marihuana introduced at trial?

4. Did the Court err in refusing appellant's offer of

proof which was intended to show that the paper in which the marihuana introduced at trial was wrapped could have had a domestic source rather than a source in Mexico?

5. Was there evidence at trial that appellant knew of the unlawful importation of the marihuana which was introduced in evidence?

6. Did the Court err in instructing the jury with respect to the offense of aiding and abetting and regarding facilitation?

7. Did the Court err in admitting into evidence testimony relating to appellant's past arrests? If so, was such error harmless?

8. Did the Court err in refusing to order a Bill of Particulars which complied with defendant's request?

IV

STATEMENT OF FACTS

On June 5, 1965, at approximately 7:00 P. M., Gordon Douglas Brucker, an informant of the Federal Bureau of Narcotics, went for a visit to the home of appellant Gary Charles DeJong, at 845 Glenway, Inglewood, California [R. T. 26]. Brucker had been acquainted with appellant for approximately two years prior to that date [R. T. 26].

At that time, Brucker and appellant had a conversation about marihuana. Appellant stated that he had no marihuana, but that he expected delivery of an ounce of marihuana within a few

minutes [R. T. 27]. Appellant made a telephone call and asked the party on the other end of the line to bring over two ounces of marihuana, one for himself and one for Brucker [R. T. 27].

Following the telephone call, Brucker asked appellant whether appellant could obtain two kilograms of marihuana [R. T. 28]. Appellant replied that he was acquainted with someone who had just received a shipment of a hundred kilograms of marihuana from Mexico and that he could obtain two kilograms from this source [R. T. 29].

Subsequently, during the same visit on June 5, 1965, one Gary Tronmpeter arrived at appellant's apartment and delivered two ounces of marihuana, one ounce going to appellant and the other ounce to Brucker [R. T. 31]. Brucker paid appellant \$10.00 for his ounce of marihuana [R. T. 32].

Before Gary Tronmpeter left appellant's residence, there was a conversation between appellant, Brucker and Tronmpeter concerning marihuana. During the course of this conversation, Brucker asked Gary Tronmpeter whether Tronmpeter could get him two kilograms of marihuana. Tronmpeter replied that he could, and the price would be \$120 per kilogram. It was agreed that this marihuana would be delivered by Tronmpeter to Brucker on Monday, June 7, 1965, at appellant's residence at 845 Glenway in Inglewood. Appellant agreed to these arrangements, whereupon Tronmpeter left [R. T. 32-33]. Brucker and appellant agreed at this time that appellant would receive two ounces of marihuana for setting up the Brucker-Tronmpeter deal [R. T. 39-40].

On June 7, 1965, Brucker met with agents of the Federal Bureau of Narcotics at the Federal Court House in Los Angeles, at about 5:30 P. M. At that time Brucker placed a telephone call to appellant. Brucker then spoke to appellant on the telephone and their conversation was monitored by an agent of the Federal Bureau of Narcotics [R. T. 34-35]. During this conversation Brucker asked DeJong if the transaction for purchase of two kilograms of marihuana was still set for 7:00 that evening, and appellant replied that it was [R. T. 36]. Brucker confirmed that he would be at appellant's residence at 7:00 P. M. sharp [R. T. 36].

Following Brucker's telephone conversation with appellant on June 7, 1965, Brucker was searched by narcotic agents and given \$240 official government advance funds with which to make his purchase of marihuana from Tronmpeter. Then Brucker and the agents proceeded to appellant's residence, arriving there at about five minutes past seven in the evening [R. T. 36, 37]. Brucker drove in his own car. Brucker met appellant, Tronmpeter and one Alan Oelke at the foot of the stairs leading to appellant's apartment [R. T. 37]. Tronmpeter introduced Brucker to Alan Oelke, and appellant assured Brucker that the marihuana was there for the sale [R. T. 38].

At appellant's apartment, Tronmpeter and Alan Oelke agreed to meet Brucker for consummation of the sale at a parking lot at the corner of La Cienega and Centinela Boulevards [R. T. 40]. Brucker told DeJong he would see him later, then drove to the parking lot where he was met by Tronmpeter and Oelke [R. T. 41].

At the parking lot, Alan Oelke got out of his car and got into Brucker's car, into the passenger seat. At that time Alan Oelke was carrying a brown paper sack containing two bricks of marihuana. Oelke placed the bag on the front seat of Brucker's car [R. T. 42]. Brucker then paid to Oelke the \$240 advance funds and took delivery of the marihuana [R. T. 44]. The sack and two bricks of marihuana were identified and admitted in evidence at the trial below [R. T. 44].

Thereafter, when the transaction with Oelke and Tronmpeter had been completed, Brucker met agents of the Federal Bureau of Narcotics at a nearby location. At this time he was again searched for money or other narcotics, with negative results [R. T. 44]. Brucker then delivered the marihuana which he had purchased to agent Theodore Yanello of the Federal Bureau of Narcotics [R. T. 44].

V

ARGUMENT

1. APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO JURY TRIAL AT THE TRIAL BELOW, EITHER BY VIRTUE OF THE FACT THAT HIS PEREMPTORY CHALLENGES TO THE JURY PANEL WERE EXERCISED JOINTLY WITH OTHER DEFENDANTS WHO WERE SUBSEQUENTLY WITHDRAWN FROM THE TRIAL, OR BY VIRTUE OF THE COURT'S FAILURE TO DISCHARGE THE JURY AFTER WITHDRAWAL OF SUCH DEFENDANTS.

As appears from the factual account contained in Section I.

supra, when the jury was selected, impanelled and sworn in the trial court there were four defendants before the court: Alan Oelke, John Oelke, Leon T. Graves, and appellant DeJong. Subsequently Alan Oelke changed his plea to guilty and John Oelke and Graves were severed out of the trial, leaving appellant the sole defendant to be tried by that jury.

Appellant now assigns as error the failure of the trial judge to permit him to select another jury to try himself alone. Appellant objects to having had to share the ten peremptory challenges allotted to the four defendants at the time the jury was selected. Appellant cited no authority for his position.

The rule is that the defendants, no matter how many of them there are, are entitled to ten peremptory challenges in this type of case, and no more. Rule 24(b) of Federal Rules of Criminal Procedure provides in pertinent part:

"If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. . . . If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

It is clear that use of the word "may" in the final sentence of Rule 24(b) confers on the trial court a discretion, but not a duty, to allow additional peremptory challenges to multiple defendants. Appellant's assignment of prejudicial error to the trial court's

failure to allot ten peremptory challenges to himself alone, when there were other defendants involved in selecting the jury, is without legal foundation.

It is a common circumstance that multiple defendants may be involved at the earliest stages of a trial, and later the number of defendants will be reduced to one. This could occur, for example, when a motion for judgment of acquittal is granted for less than all of the defendants, as well as where less than all defendants change their plea to guilty. To contend that these developments would require selection of a new jury so that the remaining defendant may exercise ten peremptory challenges, is to contend for a bizarre and erroneous rule of law.

The authority of the Supreme Court to make Rule 24(b), as well as the other federal rules, is clear in the statute, Title 18, United States Code, Sections 3771, 3772. There is no basis to question the validity or construction of that Rule.

Moreover, the record reflects that appellant's trial was severed from that of his co-defendants at his own motion. Having contended for and received a separation of his trial subsequent to swearing of the jury, appellant accepted the burdens as well as the benefits of a separate trial. Further, the record shows that appellant's counsel did not designate any prospective juror whom he wished to challenge and whom he was unable to challenge.

Further reasons assigned by appellant to the impropriety of his having been tried by the particular jury empanelled are:

- (1) that that jury was read the eight-count Indictment involving

other defendants as well as appellant; and (2) that the jury was exposed to a large exhibit of marihuana which pertained solely to defendants other than appellant. These contentions are not supportable by case law, nor has appellant sought to support them. In many cases where a single defendant is on trial the Indictment refers as well to other defendants not being tried: to say that the reading of such an Indictment is prejudicial error is simply to make an unsupported assertion.

There is nothing in the record on this appeal which would indicate that the jury below was aware of the contents of any packages which were brought into the courtroom prior to the severance of other defendants. So far as they knew and so far as the record shows, those packages could have contained any of numerous things other than marihuana. On the record, no error appears in the trial judge's failure to declare a mistrial because the jury saw the exterior of such packages.

2. **THE TRIAL COURT PROPERLY REFUSED TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL; SINCE THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.**

Appellant contends that there was insufficient evidence of his facilitation of the sale, concealment and or transportation of marihuana to support his conviction, and that the trial court erred in refusing his motion for judgment of acquittal, made pursuant to

Rule 29 of the Federal Rules of Criminal Procedure.

When the appellate courts consider an attack upon the sufficiency of the evidence on appeal, the general rule is that they must view the evidence at trial in the light most favorable to the Government.

Glasser v. United States, 315 U. S. 60 (1942);

Noto v. United States, 367 U. S. 290 (1961);

Stein v. United States, 327 F. 2d 825 (9 Cir. 1964).

cert. den. 377 U. S. 970.

The evidence before the trial court showed that appellant introduced Gordon Douglas Brucker to Gary Lee Tronmpeter for the purpose of a sale of marihuana by Tronmpeter to Brucker [R. T. 37], and that the sale was actually made. This is a sufficient showing of facilitation of concealment, transportation, and or sale of marihuana on the part of appellant. For to facilitate means to make easy or less difficult. To facilitate in any manner the transportation or concealment or sale of marihuana, within the contemplation of Title 21, United States Code, Section 176a, means willfully to do any act which makes less difficult in any way the concealment or transportation or sale of marihuana.

Vasquez v. United States, 290 F. 2d 897

(9 Cir. 1961).

The activities of appellant, as shown in the record, easily meet this test of "facilitation". Indeed, the record shows that without appellant's knowing activities as intermediary there would have been no sale of marihuana by Tronmpeter or Oelke to Brucker, for they

would never have met. The record further shows that appellant willingly offered the use of his apartment for negotiation of the sale and actively participated in such negotiation.

The credibility of witnesses and the weight to be given to their testimony is a matter within the province of the trial jury and the trial court, which have seen and heard the witnesses.

Stoppelli v. United States, 183 F.2d 391

(9 Cir. 1950), cert. den. 340 U.S. 864;

Norfolk v. McKenzie, 116 F.2d 632 (6 Cir. 1941).

It is clear that in the present case there was substantial evidence to support giving the case to the jury, and further substantial evidence to justify the jury's verdict. That being so, the court should sustain the verdict and conviction.

Glasser v. United States, supra;

Noto v. United States, supra.

3. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE EXPERT TESTIMONY BY AN AGENT OF THE FEDERAL BUREAU OF NARCOTICS AS TO THE PROBABLE SOURCE OF THE MARIHUANA WHICH WAS PLACED IN EVIDENCE AT TRIAL.
-

At trial, the Government sought to prove that the marihuana admitted in evidence against appellant had been brought into the United States unlawfully from a foreign country, and specifically from Mexico. For this purpose the Government qualified Agent Theodore Yanello of the Federal Bureau of Narcotics as an expert

witness on the origin of the packages of marihuana.

Agent Yanello's testimony was to the following effect: That he had fourteen years of experience with the Federal Bureau of Narcotics, investigating marihuana cases [R. T. 135]; that he had participated in the investigation of the instant case [R. T. 134-137]; that in fourteen years he had worked on 125 to 150 cases involving marihuana, in the States of Washington, Nevada, and California, and in Mexico [R. T. 137]; that he had worked on twenty or twenty-five cases in Mexico [R. T. 138]. Agent Yanello further testified that in his opinion the two bricks in evidence had come from Mexico [R. T. 140]. His reasons for this opinion were as follows: The marihuana was compressed in kilogram quantities, the kilogram being a system of measure used in Mexico but not in the United States [R. T. 140]; it was compressed into brick form [R. T. 141]; the type of wrapping on the two bricks was the type used characteristically in Mexico, but not used in the United States [R. T. 141]; the green color of the wrapping was typical of a Mexican source and Yanello had never seen such wrapping on domestic marihuana or in domestic narcotic traffic [R. T. 142]. Agent Yanello further testified that in his experience domestic marihuana was never transported in the form of compressed bricks, but always in loose bulk form [R. T. 143].

Appellant contends that this testimony of Agent Yanello was improperly admitted at trial, because Yanello was not a qualified expert witness as to these matters.

Expert testimony of a witness may be admitted in cases

where the jury is unable, as a body of laymen, to bridge the gap between the facts before it and the conclusions to be drawn therefrom. In such cases assistance is needed from one possessing special skill in the area involved. The need for and admissibility of such evidence is within the discretion of the trial judge.

Harris v. Afran Transport Co., 252 F.2d 536

(3 Cir. 1958);

Rhodes v. United States, 282 F.2d 59 (4 Cir. 1960),

cert. den. 364 U.S. 912;

Campbell v. Clark, 283 F.2d 766 (10 Cir. 1960).

If expert testimony is found appropriate, the qualifications of a particular witness, as to his special or technical knowledge, are likewise within the discretion of the trial judge. If the trial judge finds the witness appropriately qualified, his exercise of discretion in this regard will not be disturbed on appeal, absent an abuse of discretion.

United States v. Freundlich, 95 F.2d 376

(2 Cir. 1938);

Tucker v. Loew's Theatre & Realty Corp.,

149 F.2d 677 (2 Cir. 1945).

At the trial below, Agent Yanello was testifying to matters within his personal knowledge and experience, as clearly appears from those portions of his testimony cited above. The jury, as laymen, could not be expected to draw appropriate inferences from the wrappings and configuration of the packages of marihuana, but Agent Yanello as an expert could do this. It is submitted that the

admission of Agent Yanello's testimony as to his expert opinion concerning the source of the marihuana in question was entirely proper.

4. THE TRIAL COURT PROPERLY REFUSED APPELLANT'S OFFER OF PROOF WHICH WAS INTENDED TO SHOW THAT THE PAPER, IN WHICH THE MARIHUANA INTRODUCED AT TRIAL WAS WRAPPED, COULD HAVE HAD A DOMESTIC SOURCE RATHER THAN A SOURCE IN MEXICO.
-

During the course of trial, in the rebuttal phase of testimony, appellant's counsel made the following offer of proof [R. T. 401-402]:

"MR. HARRIS: I would like, at this time, to make an offer of proof. The offer of proof is that we are willing to produce a witness from Zellerbach Paper Company who will identify the paper in question [in which the exhibit marihuana was wrapped] as nine-inch counter-roll drug wrap, sold through the Zellerbach Company for wide distribution for stores throughout Los Angeles and California." [Matter in brackets added.]

The purpose of this offer of proof, which was rejected by the trial court, was apparently to rebut Agent Yanello's testimony that the use of the subject paper as wrapping for the marihuana indicated that the marihuana had its origin and source in Mexico.

But it was no part of the Government's case to show that

the subject paper was not available in the domestic market. Rather, the Government sought to show by Agent Yanello's testimony that the paper was characteristically used to wrap marihuana in Mexico but was not used to wrap marihuana which had its source in the United States. Thus, whether such paper is made and distributed in the United States is irrelevant, and appellant's offer of proof was properly rejected.

5. THERE WAS SUFFICIENT EVIDENCE
 AT TRIAL THAT APPELLANT KNEW
 OF THE UNLAWFUL IMPORTATION
 OF THE MARIHUANA WHICH WAS
 INTRODUCED IN EVIDENCE.

At trial, appellant's knowledge that the marihuana concerned had had its source in Mexico came into issue. Such knowledge was dealt with in the testimony of Government witnesses Gordon Douglas Brucker and Gary Tronmpeter.

Brucker testified [R. T. 30] that on the occasion of their meeting on June 5, 1965, appellant told him that appellant was acquainted with a connection for marihuana who had just received a shipment of one hundred kilograms of marihuana from Mexico. Gary Tronmpeter was introduced to Brucker as such connection on June 5, 1965 [R. T. 31, 297].

This testimony was corroborated at trial by that of Gary Tronmpeter. Tronmpeter testified that prior to June 5, 1965, on the day he brought marihuana to appellant's house, he told appellant that the person who provided the marihuana to Tronmpeter had

said that it came from Mexico City [R. T. 292-294].

It is submitted that the foregoing testimony was sufficient, when taken along with the testimony of Agent Yanello outlined in Part 3 of appellee's argument, supra, to establish appellant's knowledge that the subject marihuana had its source in a foreign country, Mexico.

Moreover, the finding necessarily made by the jury that appellant had such knowledge must be sustained on appeal if the evidence shows such knowledge when viewed in the light most favorable to the Government.

Glasser v. United States, supra;

Noto v. United States, supra;

Stein v. United States, supra.

6. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH RESPECT TO THE OFFENSE OF AIDING AND ABETTING, AND WITH RESPECT TO APPELLANT'S FACILITATION OF THE CRIME CHARGED.
-

At the trial below, the Court instructed the jury as follows [R. T. 478-480]:

"The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures the

commission is punishable as the principal.

"Whoever wilfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States and is punishable as a principal. Every person who thus wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if done voluntarily and intentionally, and with a specific intent to do something which the law forbids. That is to say, with bad purpose to disregard or disobey the law.

"You will note that Gary Lee Tronmpeter and Alan Hann Oelke are jointly charged with the defendant Gary DeJong in Counts One and Two. While you are not to determine the guilt or innocence of Tronmpeter and Oelke, since they are not before you, there is evidence before you of their acts and declarations.

"In a case where two or more persons are charged with a commission of a crime, guilt of the accused may be established without proof that the accused personally did every act constituting the offense charged. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures the commission is punishable as a principal.

"Whoever wilfully causes an act to be done

which if directly performed by him or another would be an offense against the United States and is punishable as a principal. Every person who has wilfully participated in the commission of a crime may be found to be guilty of that offense.

"Participation is wilful if voluntarily and intentionally and with specific intent to do something that the law forbids or with a specific intent to fail to do something that the law requires to be done. That is to say, with bad purpose either to disobey or disregard the law.

"In order to aid and abet another to commit an offense it is necessary that the accused wilfully associate himself in some way with the criminal venture and wilfully participate in some way with the criminal venture, and wilfully participate in it as he would in something he wishes to bring about. That is to say, that he wilfully seeks by some act or omission of his to make the criminal venture succeed."

Appellant assigns the giving of these instructions as error. since appellant was charged in the Indictment as a principal in concealing, transporting and, or selling marihuana illegally brought into the United States and was not directly charged with aiding and abetting.

United States Code, Title 18, Section 2 provides:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

It is well established that a person charged in an Indictment only as a principal may be convicted on evidence that he aided and abetted commission of the crime charged.

Grant v. United States, 291 F.2d 746

(9 Cir. 1961);

Nye & Nissen v. United States, 168 F.2d 846

(9 Cir. 1948);

And see:

Stewart v. United States, 311 F.2d 109

(9 Cir. 1962).

Such evidence with respect to appellant, showing that he aided and abetted the sale, concealment, and/or transportation of marihuana by Alan Hann Oelke and Gary Lee Tronmpeter, was presented at trial. See Section 2 of Argument, supra. Accordingly, it is submitted that the trial court acted properly in instructing the jury on the issue of aiding and abetting on appellant's part.

The Court further instructed the jury with respect to the

meaning of the word "facilitate" as used in United States Code, Title 21, Section 176a and in Count One of the Indictment:

"To facilitate, as used in the statute in the elements of this case, means to make easy or less difficult. So, to facilitate in any manner the transportation or concealment or sale of a narcotic drug means wilfully to do or fail to do an act which makes less difficult in any way the concealment or transportation or sale of the narcotic drug."

This instruction was clearly proper.

Vasquez v. United States, 290 F.2d 897

(9 Cir. 1961);

Bruno v. United States, 259 F.2d 8 (9 Cir. 1958);

Pon Wing Quong v. United States, 111 F.2d 751

(9 Cir. 1940).

Nor was evidence of appellant's facilitation of the concealment, transportation and/or sale of marihuana lacking. See Section 2 of Argument, supra. The same evidence which showed aiding and abetting by appellant would show the prime offense of facilitating.

7. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY RELATING TO APPELLANT'S PAST ARRESTS; IF IT DID ERR, THE ERROR WAS HARMLESS.

In the course of the Government's cross-examination of appellant at the trial below, the following occurred [R. T. 257-258]:

"Q. BY MR. PINES: Were you arrested in March of this year?

"A. Yes.

"Q. What was the charge?

"A. Burglary and drunk.

"Q. And what happened to that charge?

"A. They dropped it.

"Q. What had you been doing?

"A. Drinking.

"Q. You were drunk?

"A. (Nodding.)

"THE COURT: What does that have to do with the offense (sic) of entrapment?

"MR. HARRIS: I move for a mistrial on prejudicial misconduct by the prosecutor if he knew those were the questions he was going to ask. He specifically told the Court he was going to show pre-disposition to this offense. I would like the prosecutor censored (sic) for this and I want to move for a mistrial at this time.

"THE COURT: The motion for a mistrial is denied. The last two questions and answers are ordered stricken from the record; and, I admonish the jury to disregard these questions and answers."

Based upon the foregoing, appellant now contends that the

trial court prejudicially erred in denying appellant's motion for a mistrial on the ground of prejudicial misconduct by the prosecutor.

But the trial court excised from the record and admonished the jury to disregard the prejudicial portions of the quoted testimony. These were the questions and answers as follows:

"Q. What had you been doing?

"A. Drinking.

"Q. You were drunk?

"A. (Nodding.)"

The prosecutor prefaced this line of questioning by stating [R. T. 257]:

"MR. PINES: We are concerned with entrapment in the defense here and I am going into the predisposition of this defendant. This evidence of prior offenses is admissible, as I can read the language of the Supreme Court. "

Clearly, evidence of predisposition on a defendant's part is admissible to negate the defense of entrapment.

Sherman v. United States, 356 U.S. 369 (1958);

Masciale v. United States, 356 U.S. 386 (1958).

In showing prior acts, the prosecution may make inquiry into a defendant's previous conduct.

"The predisposition and criminal design of the defendant are relevant; . . . [If] the defendant

seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

Sorrells v. United States, 287 U. S. 435, 451-452
(1932).

It is clear on the record of the trial below that the prosecutor was indeed making such a searching inquiry in approaching this line of questioning.

Moreover, even if the entire line of questioning concerning appellant's arrest for burglary and drunkenness was irrelevant to the issue of entrapment and therefore was improperly admitted, such error was clearly harmless and not prejudicial to appellant. Such arrest then would have nothing to do with the case and, in view of all of the other evidence against appellant, would not be prejudicial.

McRae v. United States, 163 F.2d 868
(9 Cir. 1947);

Kowalchuk v. United States, 176 F.2d 873, 878
(6 Cir. 1949).

Where the record contains sufficient evidence of guilt, the Court of Appeals should not reverse a conviction because unimportant and irrelevant testimony may have crept in, unless there is strong reason to think that practical injustice has been done.

8. THE TRIAL COURT PROPERLY REFUSED TO ORDER THE GOVERNMENT TO FURNISH A BILL OF PARTICULARS WHICH COMPLIED WITH DEFENDANT'S REQUEST FOR A BILL OF PARTICULARS.
-

The trial court denied all but two of the numbered requests submitted by appellant and constituting his Motion for Bill of Particulars [C. T. 10-17]. This denial is assigned by appellant as prejudicial error.

At the outset, it must be noted that whether to grant a motion for a bill of particulars is within the discretion of the trial court. A determination of such a motion will not be disturbed on appeal in the absence of an abuse of discretion.

Wong Tai v. United States, 273 U.S. 77 (1927);

Yeargain v. United States, 314 F. 2d 881

(9 Cir. 1963);

Cooper v. United States, 282 F. 2d 527 (9 Cir. 1960);

Rodella v. United States, 286 F. 2d 306

(9 Cir. 1960), cert. den. 365 U.S. 889;

Schino v. United States, 209 F. 2d 67 (9 Cir. 1954),

cert. den. 347 U.S. 937;

Frederick v. United States, 163 F. 2d 536

(9 Cir. 1947), cert. den. 332 U.S. 772.

The purpose of a bill of particulars is twofold, as stated

in Cooper v. United States, supra, 282 F. 2d at p. 532:

"A bill of particulars should be granted where it is thought necessary (1) to protect the defendant against a second prosecution for the same offense, or (2) to enable the defendant to adequately prepare his defense and avoid surprise at trial."

In answer to appellant's contention that he was surprised by the nature of the charges facing him at trial (Brief for Appellant, pp. 73-79), it should be noted that if there was such surprise, appellant might have moved at the start of trial for a continuance; however, he failed to do so. Moreover, Counts One and Two of the Indictment, the counts involving appellant, are clear in their purport and advised appellant of the charge which he was called upon to answer [C. T. 1, 2].

The trial court clearly acted within its discretion when it denied appellant's requests. Even a cursory examination of these requests [C. T. 11-15] shows that they seek information involving divulging of evidentiary matters, a list of witnesses, and particulars clearly stated in the Indictment. Accordingly, the trial court's denial of these requests was dictated by the language of the Supreme Court in Wong Tai v. United States, supra, 273 U. S. at p. 82:

"The defendant also made a motion, supported by affidavit, for a detailed bill of particulars setting forth with particularity the specific facts in reference to the several overt acts alleged in the indictment,

with various specifications as to times, places, names of persons, . . . , etc., and the manner in which, the specific circumstances under which they were committed. This motion - which in effect sought a complete discovery of the Government's case in reference to the overt acts - was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called for too much detail of the evidence. "

Moreover, in the present case the identity of the Government's informer, Gordon Douglas Brucker, was revealed to appellant's counsel prior to trial, and Brucker appeared as a witness for the Government. This case is thus entirely different from that of Roviaro v. United States, 353 U. S. 53 (1957). Roviaro was a case where the Government had refused to make disclosure of the informant's identity, and under the circumstances a reversal of the petitioner's conviction resulted. Here, on the contrary, there was full disclosure prior to trial of the informant's identity (Brief for Appellant, p. 77). The Court in Roviaro clearly recognizes the Government's interest in nondisclosure of an informant where danger to the informant or detriment to the public interest would result from disclosure.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer

MICHAEL HEUER

FEB 20 1967

NO. 20588 /

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FOR THE NINTH CIRCUIT

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Appellee.

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MAY 1967

MR. B. LUCAS, CLERK

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I

JURISDICTIONAL STATEMENT

The appellants, Jackson Fee (sometimes hereinafter referred to as "Fee") and Merrill Mack Moser (sometimes hereinafter referred to as "Moser") were indicted by the Federal Grand Jury for the Southern District of California on July 24, 1963 [C. T. 2]. ^{1/} The indictment contained one count alleging that on June 17, 1963, Fee and Moser by force and violence and by intimidation took \$3,273 from a teller of the Citizens National Bank, Los Angeles, California, a national bank whose deposits

^{1/} "C. T." refers to Clerk's Transcript.

were insured by the Federal Deposits Insurance Corporation [C. T. 2].

Appellants were arraigned in Los Angeles on April 26, 1965 [C.T. 41]. Subsequently, on May 24, 1965, the Honorable Jesse W. Curtis, United States District Judge, denied appellants' motion to dismiss the indictment because of an alleged deprivation of their right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution. Appellants then entered pleas of not guilty to the charge stated in the indictment [C. T. 42].

Appellants' trial commenced on June 1, 1965, before the Honorable Charles H. Carr, United States District Judge [C. T. 43]. On June 3, 1965, the jury returned a verdict of guilty as to each appellant [C. T. 45]. Appellants were each sentenced to 25 years imprisonment on June 3, 1965 [C. T. 45].

On July 11, 1965, a notice of appeal was filed pursuant to Rule 37(a)(1), F. R. C. P. [C. T. 48].

The jurisdiction of the District Court was based upon Section 2113(a)(d) of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATIONS OF ERRORS

A. Were appellants denied their right to a speedy trial as guaranteed by the Sixth Amendment of the Constitution of the United States?

B. Were appellants denied their right to counsel, as guaranteed by the Sixth Amendment of the Constitution of the United States?

C. Did the trial court commit error in finding appellants' confessions to be voluntary and admitting them into evidence at the trial?

III

STATEMENT OF FACTS

On July 24, 1963, the Grand Jury for the Southern District of California returned a one-count indictment charging Moser and Fee with having robbed the Citizens National Bank, 5400 South Western Avenue, Los Angeles, California, on June 17, 1963. The indictment further alleged that the defendants used a shotgun during the commission of the aforesaid robbery, thus placing in jeopardy the life of one Marcella Coughlin, a teller at Crocker Citizens Bank [C. T. 2-3].

At approximately 1:10 P. M. on July 12, 1963, Moser and Fee were taken into custody by the Federal Bureau of Investigation near Greenback, Tennessee for robbing the Merchants and Farmers Bank at Greenback, Tennessee on or about 12:00 P. M. on July 12, 1963 [R. T. 203-209]. ^{2/} At this time both Moser and Fee were advised of their right to counsel, the right to remain silent and that any statement that they did make could be used against

^{2/} "R. T. " refers to Reporter's Transcript.

them in a court of law [R. T. 207].

At approximately 3:10 P. M. , July 12, 1963, Moser and Fee were taken to Knoxville, Tennessee and were taken before a United States Commissioner, who informed them that they were charged with the Greenback, Tennessee bank robbery and also advised of their right to remain silent and their right to counsel [R. T. 209-210].

Initially, the interrogation of Moser and Fee was limited to the Greenback robbery [R. T. 195]. At approximately 8:45 P. M. Fee and Moser were first interrogated about the Los Angeles robbery which is the subject of this appeal [R. T. 195]. At this time Moser and Fee were again advised of their right to counsel, their right to remain silent, and that anything they said could be used against them in a court of law [R. T. 145, 220].

On or about 10:30 P. M. on July 12, 1963, after conferring between themselves [R. T. 218], appellants admitted robbing the Los Angeles bank on June 17, 1963 and shortly thereafter signed detailed statements describing this robbery [R. T. 159, 184; Plaintiffs' Exhibits 9 and 10].

On September 20, 1963, appellants appeared in Criminal Action No. 16977 in the United States District Court for the Eastern District of Tennessee, Northern Division, waived indictment and were arraigned and pleaded guilty to the Greenback, Tennessee robbery [C. T. 6]. Thereafter, on October 22, 1963, appellants were sentenced to prison for a term of 24 years [C. T. 6-9], pursuant to Title 18, United States Code, Section 4208(a)(2)

[C. T. 18].

The appellants were thereafter incarcerated in the Federal prisons in Atlanta, Georgia and Leavenworth, Kansas. Appellants remained incarcerated in their respective Federal penitentiary at all times from October 22, 1963 until early April 1965, except when appellant Moser returned to Knox County Jail, Knoxville, Tennessee in February, 1965 for a hearing on his petition filed in the United States District Court, Eastern District of Tennessee, Northern Division, pursuant to Title 18, United States Code, Section 2255. Appellant Moser was returned to the Federal Penitentiary in Atlanta, Georgia on March 5, 1965 [C. T. 6-11].

In the statements signed by appellants they admitted robbing the bank in Los Angeles. Both appellants stated that a third man had been hired to drive the get-away car from the robbery [R. T. 390-393 and Plaintiffs' Exhibits 9 and 10]. During the incarceration of appellants they were interrogated several times by the Federal Bureau of Investigation concerning the identity of this third person who was involved in the robbery [C. T. 7, 8, 10].

On January 7, 1964, appellant Fee wrote a letter to the United States Attorney in Los Angeles inquiring into the disposition of this case. The United States Attorney immediately replied and informed appellant Fee that there had been no disposition of this case as of that date [C. T. 9]. On or about March 20, 1965, appellants wrote to the United States Attorney and requested that an early disposition be made of the indictment returned on July 24, 1963 [C. T. 7]. This was the first demand for trial received from

either appellant. On April 18 and 24, 1965, appellants were transferred to Los Angeles and they were arraigned on April 26, 1965 [C. T. 6, 9]. A motion was heard to dismiss the indictment on May 24, 1965 and this motion was denied by the Honorable Jesse W. Curtis, United States District Judge [C. T. 42].

Appellants' trial commenced on June 1, 1965 and the Government presented three witnesses who identified Fee and Moser as the men who robbed the bank on June 17, 1963 [R. T. 58-60, 80-82 and 33]. In addition, the Government called another witness who identified Fee as the man holding the sawed-off shot gun and also recorded the license number of the get-away car [R. T. 95-96, and 101-102]. The Government introduced into evidence the signed statements of Fee and Moser, wherein each admitted the commission of the crime and these admissions stated that a third party had participated in this crime [R. T. 305, 353].

Appellants testified both outside of the hearing of the Jury [R. T. 221, 246] and before the Jury [R. T. 294, 316], denying their guilt and contended that their signed admissions were not voluntary. The Honorable Charles H. Carr, United States District Judge, made the expressed finding that the signed admissions were voluntary [R. T. 259] and that he did not believe the testimony of either appellant concerning whether their rights had been violated [R. T. 254].

On June 3, 1965, the Jury found appellants guilty as charged in the indictment. Appellants were each sentenced to 25 years in prison for the crime of bank robbery [C. T. 46, 47].

IV

ARGUMENT

A. IN LIGHT OF ALL THE CIRCUMSTANCES,
APPELLANTS' RIGHT TO A SPEEDY
TRIAL HAS NOT BEEN VIOLATED.

The passage of time is one factor to consider in determining whether a defendant has been denied his right to a speedy trial. The lapse of 22 months from indictment to trial, standing alone, does not constitute a violation of appellants' right to a speedy trial. See: United States v. Ewell, 383 U.S. 116 (1965) and Fouts v. United States, 253 F.2d 215 (6th Cir. 1958). As the Supreme Court of the United States stated: "The right to a speedy trial is necessarily relative. It is consistent with delays, it depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Beavers v. Haubert, 198 U.S. 77, 87 (1905). The delay and its effect must be tested by the circumstances attendant to the specific case. Pollard v. United States, 352 U.S. 354, 361 (1957).

Appellants contend that there has been a 22 months delay between the return of the indictment on July 24, 1963, and the commencement of the trial on June 1, 1965. Part of this period is totally beyond the control of the Government as shown by the fact that from July 12, 1963 to October 22, 1963, appellants were in the custody of the United States District Court for the Eastern District of Tennessee and in the process of pleading guilty and being sentenced for robbing a bank in Greenback, Tennessee on July 12,

1963 [C. T. 7, 9].

During the month of March, 1965, appellant Moser sent a letter to the United States Attorney for the Southern District of California requesting that they be tried for the Los Angeles bank robbery or that the indictment be dismissed [C. T. 7]. Upon receipt of appellant Moser's request for a trial, the Government immediately had the prisoners transferred to Los Angeles in mid-April, 1965, and arraigned on April 26, 1965, and the trial commenced on June 1, 1965. Therefore, the delay from which appellants complain consists of approximately 16 months from October 22, 1963 to March, 1965 when the first request for trial was submitted and immediately acted upon.

1. ADEQUATE REASONS EXIST FOR
 THE 16 MONTHS DELAY IN BRING-
 ING APPELLANTS TO TRIAL.

On July 12, 1963, appellants signed statements admitting their commission of the Los Angeles robbery. In these statements the appellants stated that a third man drove the car in the robbery and was paid for his service [R. T. 390-393]. Due to the implication of a third participant in the robbery the Federal Bureau of Investigation launched an extensive investigation to determine the identity of the third subject. This investigation has included a multitude of interviews with numerous suspects, a review of prison records at Folsom, Vacaville, and San Quentin and numerous interviews with inmates of those institutions who were associated with

appellants. Appellants have subsequently denied that a third man participated in the robbery [C. T. 20].

In Harlow v. United States, 301 F.2d 361 (5th Cir. 1962), the court held that a post indictment investigation, lasting two years for the purpose of obtaining additional evidence for trial was neither unreasonable nor unnecessary. In addition, the court stated that the fact that no evidence resulted from this investigation has no bearing on the question of whether it was reasonable and necessary. The court noted that the Government immediately proceeded to bring the case to trial once they were certain that the additional evidence was not available. In the present case, the investigation for additional evidence concerning the Los Angeles robbery lasted less than two years and was diligently pursued once the information concerning the implication of a third man was made known by appellants. The propriety of the continued investigation in the Harlow case, ibid, is equally applicable in the present case because the Government was compelled to investigate all facts concerning the case in order to be properly prepared for trial. It is irrelevant that no additional evidence was obtained and that appellants were convicted on the evidence available prior to the investigation.

The Government recognizes that the right to delay a trial for continued investigation subsequent to indictment must be limited and will be proscribed if the investigation is for an inordinately lengthy period of time while the defendant is in custody under the indictment that is being investigated. See the Petition of

Provo, 17 F.R.D. 183 (D.C. Md. 1955). In considering whether the Government's continued investigation was reasonable, the fact that the appellants were not in custody for the indictment should be considered. While it is true that a defendant's right to a speedy trial is not to be impaired because of his incarceration on a separate and distinct charge, see Ponzi v. Fessenden, 258 U.S. 254 (1927), it is submitted that the fact that a defendant is incarcerated for a different and unrelated crime should not be a reason to compel the Government to bring the case to trial any sooner than if the defendant were free from custody. In Harlow v. United States, supra, the defendant was not in custody and the court held that an investigation of two years subsequent to the indictment was reasonable and necessary and did not violate the defendant's right to a speedy trial.

The rights of a defendant to a speedy trial constitutes a balancing of the individual rights involved with the needs of public justice. See Pollard v. United States, supra. It is submitted that economy of judicial administration is a valid consideration of public justice. In the present case the facts required that the appellants be tried jointly because they acted together in robbing the bank, the arresting officers must be brought to Los Angeles from Tennessee, and it would therefore be unduly expensive and difficult to effectively try each appellant separately. In this respect, it should be considered that appellant Moser was involved in distinct legal proceedings before the United States District for the Eastern District of Tennessee from September 1, 1964 to

March 5, 1965 [C. T. 20-21], and was not available for trial during that time.

2. IN BALANCING THE RIGHTS OF
THE INDIVIDUAL WITH THE
NEEDS OF PUBLIC JUSTICE,
THE LACK OF PREJUDICE TO
THE DEFENDANT FROM THE
DELAY IS A RELEVANT CON-
SIDERATION.

Apparently, appellants' only contention of prejudice is that they were interrogated several times during their incarceration concerning the Los Angeles robbery [C. T. 7-10]. It is conceded that some interrogation did occur during their incarceration but contrary to the statements made in appellants' brief (Appellants' Opening Brief, page 17), there was no attempt to obtain a confession of the crime because appellants had previously signed statements admitting all of the facts of the crime except for the identity of the third party. In fact, no information obtained from any post-indictment interrogation was used in this trial. It is proper for the Government to conduct interrogation of defendants after indictment and in fact the Supreme Court in Massiah v. United States, 377 U.S. 201, 207, recognized the propriety of a continuing investigation of a defendant after indictment.

The overwhelming majority of cases which have considered whether a defendant has been deprived of his right to a speedy trial

consider the prejudice defendant has suffered by the delay. ^{3/} As the Court stated in United States v. Holmes, 168 F.2d 888 (2nd Cir. 1947), at 891:

"In the complete absence of any indication that the instant defendant was adversely effected in the preparation or prosecution of his defense by the lapse of time in bringing the case to trial . . . defendant had no complaint without a demand."

Appellants have not made any showing of fact or allegation which indicates that they have been prejudiced by the delay in their defense of this case. The statements admitting this robbery were signed by appellants more than one week prior to the return of the indictment. The other evidence in the case primarily consisted of the eye witnesses who identified the appellants, tracing of the license number of the get-away car and identifying that the car was owned by appellant Moser. There was no evidence in the trial which was in any way altered or affected by the delay.

^{3/} See United States v. Ewell, 383 U.S. 116, 122 (1965); Yeaman v. United States, 326 F.2d 293, 294 (9th Cir. 1963); United States v. Simmon, 338 F.2d 804, 807 (2nd Cir. 1964); Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956); and Petition of Provoo, 17 F.R.D. 183, 203 (D.C. Md. 1955).

3. THE QUESTION OF WHETHER A
DEFENDANT HAS BEEN DEPRIVED
OF HIS RIGHT TO A SPEEDY TRIAL
IS TO BE DETERMINED IN THE
SOUND DISCRETION OF THE TRIAL
COURT AND IN THE PRESENT CASE
THERE IS NO SHOWING OF AN
ABUSE OF THIS DISCRETION.

Rule 48(b) of the Federal Rules of Criminal Procedure provides for the dismissal of an indictment for unnecessary delay in bringing a defendant to trial. This Rule 48(b) is an implementation of the right to a speedy trial guaranteed by the Sixth Amendment of the Constitution of the United States. United States v. Ward, 240 F.Supp. 659 (D. C. Wis. 1965).

A motion to dismiss for lack of prosecution is addressed to the sound judicial discretion of the trial judge. United States v. McWilliams, 163 F.2d 695 (D. C. Cir. 1947).

On review of a ruling to dismiss for lack of prosecution, the Court of Appeals is not to be concerned with the question of whether it would reach the same result, but whether there exists an abuse of discretion. United States v. Hester, 325 F.2d 654 (9th Cir. 1963).

On May 24, 1965, the Honorable Jesse W. Curtis, United States District Judge, heard appellants' motion to dismiss and based upon the record and oral arguments denied appellants' motion [C. T. 42]. While the trial judge did not write an opinion setting forth his reasons for denying the motion, it is respectfully submitted that there exist numerous reasons justifying the trial

court's decision. In addition, appellants have failed to show this Honorable Court any facts which establish an abuse of discretion. It is therefore respectfully submitted that for this reason alone, appellants' contention that they have been deprived of their constitutional rights to a speedy trial be denied.

4. APPELLANTS RECEIVED A
TRIAL IMMEDIATELY AFTER
THEIR REQUEST FOR A
SPEEDY TRIAL.

There are a line of cases holding that even if the delay is deemed unnecessary and unreasonable that a person's right to a speedy trial is a personal right that the defendant must assert before he can be considered to have been deprived of his right to a speedy trial. See Danziger v. United States, 161 F.2d 299 (9th Cir. 1947); Collins v. United States, 157 F.2d 409 (9th Cir. 1946).

In early 1964 appellant Fee made an inquiry of the United States Attorney's Office, Southern District of California, concerning the existing indictment for the Los Angeles robbery [C. T. 9]. The Government responded that no decision had been made concerning the disposition of this case [C. T. 9]. During March 1965 appellant Moser wrote to the United States Attorney for the Southern District of California and requested disposition of this case [C. T. 7]. This letter was the first demand by either appellant that they be tried on the charges.

Immediately upon receipt of the letter requesting a speedy

disposition of this case, the Government had appellants transferred to Los Angeles, California, and arraigned before the United States Court [C. T. 6, 9]. On May 17, 1965, appellants filed a motion to dismiss the indictment for the alleged deprivation of their right to a speedy trial [C. T. 4]. On May 27, 1965, appellants' motion was heard and denied [C. T. 42]. The trial of this case commenced on June 1, 1965 and appellants were convicted and sentenced on June 3, 1965 [C. T. 43-47]. Thus, a period of less than 90 days elapsed from the time the appellants requested a trial and their ultimate conviction and sentencing. Considering the distance travelled, the pretrial motions filed, and allowing time for preparation of their defense, this 90 days delay between the demand for the trial and completion thereof does not constitute an unreasonable delay in bringing appellants to trial.

**B. THE TRIAL COURT DID NOT ERR IN
ADMITTING INTO EVIDENCE THE
CONFESSIONS OF APPELLANTS OF
THE LOS ANGELES BANK ROBBERY.**

Appellants contend that the undisputed facts in the record plainly show that the confessions were involuntary. The facts relied upon by appellants are:

1. That the interrogation for both crimes lasted from approximately 4:30 P. M. to 10:40 P. M. ;
2. That by confessing to the prior bank robbery, the appellants were placed in a disadvantageous position for the

interrogation on the Los Angeles Bank robbery;

3. That the Federal Bureau of Investigation Agent answering appellant Moser's question on Rule 20 created the possibility of concurrent sentences in the minds of appellants and this possibility of leniency triggered their confessions; and

4. No attorney was present during the interrogation.

In addition, appellants contend that the failure of the Federal Bureau of Investigation to follow the interrogation guidelines set forth in Miranda v. Arizona, 384 U.S. 436 (1966), taken into consideration with the previously mentioned facts indicating involuntariness, leads " . . . plainly to the conclusion that the confessions were involuntary" [Appellants' Opening Brief, page 23].

1. "APPELLANTS WERE NOT DEPRIVED OF THEIR RIGHTS TO COUNSEL AND WERE FULLY ADVISED OF THEIR CONSTITUTIONAL RIGHTS TO COUNSEL AND TO REMAIN SILENT."
-

Trial in this case commenced on June 1, 1965, and as the court held in Johnson v. New Jersey, 384 U.S. 719, 734 (1966), the requirements of Miranda v. Arizona, supra, are not controlling in determining the inadmissibility of the confession. The admissibility of appellants' confessions is dependent upon whether it was voluntary (which is discussed IV, B, 2, infra), and if the ruling set forth in Escobedo v. Illinois, 378 U.S. 454 (1964) has been violated. In Escobedo, supra, the Court held that when a suspect has requested and been denied an opportunity to consult with a

lawyer and when the police had not effectively warned him of his absolute right to remain silent, any statement he makes under those circumstances will be inadmissible. Id. at 490-491. Appellants now contend that they requested counsel during the interrogation and their request was denied [R. T. 231]. However, the testimony of the interrogating agents refutes the allegation that counsel was demanded and denied [R. T. 157, 161, 178].

After hearing the evidence, the trial judge found that he disbelieved appellants' testimony concerning the facts of the interrogation and based this disbelief upon their demeanor on the stand, their actions and that everything about them indicated to the trial judge that they were fabricating their story [R. T. 255]. The record in this case is replete with evidence that the appellants received a number of warnings as to their right to counsel and their right to remain silent [R. T. 145, 207, 209-210, and 220].

If a defendant knowingly is aware of his right to remain silent and to have counsel and does not request such counsel he has waived such assistance. See United States v. Childress, 347 F.2d 448, 450 (7th Cir. 1965); Hayes v. United States, 347 F.2d 668 (8th Cir. 1965). The failure of appellants to demand counsel constitutes a basis upon which the interrogator can continue questioning without the presence of counsel and there has been no violation of appellants' right to counsel, or of the holding set forth in Escobedo v. Illinois, supra.

2. APPELLANTS' CONFESSIONS WERE VOLUNTARY AND THEIR ADMISSION INTO EVIDENCE DOES NOT CONSTITUTE A VIOLATION OF DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT.

Appellants contend that their confessions were involuntary as a matter of law because they were interrogated from 4:30 to approximately 10:40. However, the record shows that the interrogation concerning the Los Angeles robbery commenced at approximately 8:40 P. M. and appellants confessed at approximately 10:40 P. M. [R. T. 156, 159, and 183-184]. The record in this case is void of any indication that appellants were ill-treated during this two hour interrogation concerning the Los Angeles robbery, or at any other time. While appellants did not accept food, the record shows that food and restroom facilities were made available to appellants [R. T. 179, 213] and cigarettes were given to them [R. T. 332].

Appellants contend that because they had confessed to robbing the Greenback Bank prior to being interrogated on the Los Angeles Bank, that this prior confession placed them in such a disadvantageous position to the interrogators that their confessions could not be the result of a free will. It must be noted that appellants confessed to the Greenback robbery within one hour of their arrest. They confessed when they were taken to the bank, even before being taken to Knoxville [R. T. 210].

In a companion case decided in Miranda v. Arizona,

Westover v. United States, 384 U.S. 494 (1966), the Court refused to assume an intelligent waiver of constitutional rights when one had been in custody for over fourteen hours and had been interrogated at length during that period. The defendant Westover had not been advised of any of his constitutional rights during the prior interrogation by the Kansas City Police. This case supports the proposition that it is valid to continue to interrogate the defendant on other crimes, but that the overall length and nature of the interrogation must be considered. In the case now before the Court, the appellants were fully warned and advised of their rights prior to any interrogation concerning the Greenback Bank robbery and they readily confessed after a short period of interrogation. Interrogation commenced concerning the Los Angeles robbery at approximately 8:40 P. M. and appellants were again advised of their rights. Around 10:00 P. M. appellants chose to discuss the case after conferring between themselves [R. T. 184-186]. It is difficult to see how appellants' will was overborne, when they made a joint decision to talk.

Appellants contend that because the record shows that Moser refused to say anything after being advised of his constitutional rights prior to the interrogation concerning the Los Angeles robbery and that no waiver can be assumed. However, the record is equally void of any refusal of appellants to converse with the Agents of the Federal Bureau of Investigation. Appellants participated in a general discussion with the Agents [R. T. 184]. At approximately 10:30 P. M. appellants were permitted to confer

among themselves and at this time they decided to discuss the Los Angeles Bank robbery [R. T. 184-186]. It would be difficult to imagine a more explicit waiver of the constitutional right to remain silent that that given by appellants once they had conferred among themselves and decided to tell the story concerning the Los Angeles Bank robbery.

Appellants' argument that the Rule 20 discussion created a possibility of leniency and therefore, is an indication of the involuntariness of the confession is specious. The record is clear that Appellant Moser first mentioned this subject [R. T. 184, 193-196 and 217] that Agent McGovern explained it correctly and made it clear that he had no control over whether or not it would be available to appellant. The fact that appellants were aware of the existence of Rule 20 shows that they knew the possibility of the benefit of concurrent sentences. The record shows that the interrogators made it clear that there was no way of knowing what sentence would be given [R. T. 198-199].

The logical conclusion is that appellants' confessions were not triggered by promised leniency, but instead was a calculated move by appellants to try and obtain a Rule 20 transfer and a possible concurrent sentence. Appellants' only objection is that their strategy went astray and that they did not receive their concurrent sentences. The rational mind displayed by this maneuver is strong evidence that the confessions were the product of a free and rational will.

Contrary to the contentions of appellants, the record contains

an abundance of evidence showing that the confessions were voluntary. The record is clear that appellants were fully advised of their rights on at least three separate occasions, the appellants have not alleged any unusual or cruel treatment, appellants' conversations were coherent and no alcohol was detected by the interrogators, appellants both had long criminal records and were well aware of the nature of the proceedings with which they were confronted [R. T. 446-452], appellants were allowed to confer among themselves prior to making any statement concerning the Los Angeles robbery, and the trier of fact unequivocally disbelieved the story presented at the trial by appellants.

The overwhelming evidence in the case now before the Court clearly shows that the appellants made a rational decision to confess in order to attempt to gain the benefits of Rule 20. It does not show that their will was overborne in any manner, just that their plan did not work. It is respectfully submitted that the confessions be deemed voluntary.

CONCLUSION

For the reasons stated the judgment of the District Court should be confirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
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Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD
Assistant U. S. Attorney

NIEL A. ROBIDA,

NO. 20592 ✓

Petitioner,

PETITION FOR REHEARING

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

See Vol.
3374

DANIEL ROBIDA respectfully petitions for a rehearing on the

GROUND

That the January 20, 1967 decision of this Court does justice, but not completely. That decision indicates that the primary issue was Petitioner's claim of exemption under section 911 of this Internal Revenue Code of 1954. The decision does not determine the effect of Respondent's abandonment of the grounds stated in his deficiency notice and his answer for the effect of Respondent's access to Petitioner's records, withholding them from Petitioner; the availability of the net worth system; the application of the statute of limitations. Petitioner believes and urges that complete justice requires these matters to be considered and determined.

1. THE PRIMARY ISSUE WAS FRAUD

a) A deficiency notice is equivalent to a summons which the taxpayer answers by a petition to the Tax Court. The Commissioner's answer is in the nature of replication. See Baglivo v. CIR (D.C. Pe. 1954) 235 Supp 493, 495 and Papineau v. CIR 28 TC 54, 57.

b) The CIR's Notice (IR 43-61) based assessment on fraud.

c) Paragraphs 7(c) and (d) of CIR's Answer (IR 7-12) indicate that calculation of deficiencies was done on the net worth system. (Answer Exhibit A). The net worth system was used in aid of the fraud charge.

arged Petitioner with concealing assets, refusing to make records available and failure to file returns, all by way of fraud. The charge of gambling (Answer 7(b) was also part of the concealing charge and not connected to any other issue.

3. WHEN CIR ABANDONED FRAUD, NO ISSUE REMAINED

a) The CIR is bound by the conduct of his counsel (CIR v. Erie Large Co. (C.C.A.3 1938) 167 F2d 71.

At the trial counsel for the Commissioner said:

"A fraud issue has been raised but Respondent is abandoning the fraud issue." (II R 2-3 line 12)

He also conceded:

"The deficiencies set up are based on a net worth estimate, your Honor, and I think you will find them attached to the Answer." (II R 12 line 6)

. Ciranni made it plain that fraud was based on failure to file:

"I have already told him we had found the returns.

He can't get them into evidence, but I will get them into evidence. We have copies of them here. This was the basis of our fraud allegation." (II R 17)

b) After the CIR abandoned fraud MR. ROBIDA said:

"I don't know how to proceed." (II R 16 line 1);
and "I would like to request the Respondent to make it more clear to me what is the basis for them having served a Jeopardy Assessment on me in the first place." (II R 16 line 2-4)

Commenting on the Notice, and Answer, ROBIDA said:

"The inconsistencies are very hard on me to

c) No Issue Remained. In Leon Papineau v. CIR (1967) 28 TC 54, 55, the CIR in an Answer relied on different grounds than the deficiency notice was held to have abandoned his original determination. In the instant case the Answer contained no new material. Therefore when the CIR abandoned the ground theretofore relied on there was no issue before the Court and no burden of proof on either party.

In Moise v. Burnette (CCA 9th) 52 F2d 1071, 1072 the CIR at time of trial attempted to rely on grounds not noticed and not pleaded. The Court held that proper construction of the statutes

"....required that a claim should actually and definitely be made and not left to conjecture, inference or interpretation.", and that the CIR

"....must be bound by his pleadings and cannot be assumed to have intended to present a claim that he did not actually make." 52 F2d 1071, 1072.

In Moise, the Court noting that the statute limitations had run, said

"....neither the Commissioner nor the Board had the power to determine any deficiency whatever."

In Tex-Penn Oil Co. v. CIR (CCA 3 83 F2d 518, 524 the CIR was held to have abandoned notices where he changed grounds. The Court ordered judgment on deficiency.

In ROBIDA the Tax Court and the CIR inferred that issues remained after CIR repudiated the grounds of his Notice and Answer (II R 14). In fact no issue did remain.

U.S. v. Heath (CCA 9th 1958) 260 F2d 623, 632 held that where the Government withheld taxpayer's records it forfeited right to proceed further in criminal fraud trial. Hinchcliffe v. Clarke (1963) 230 F. Supp 91, 64-2 TC 93 and Lord v. Kelly (1964) 334 F2d 742, Cert. denied 85 S. Ct. 650, S. 961, 13 L Ed 2d 556 apply the same principle to civil tax cases.

a) The record shows that Respondent obtained Petitioner's records or to trial without consent or process and denied Petitioner access. Petitioner continuously sought their return.

Respondent at oral argument before this Court said that the CIR or his counsel now have only some of the records and that they will make the originals of those only available at further trial.

The party having access to part of the records is deemed to have them as U.S. v. Consolidated Laundries Corp. 291 F2d 763, 571.

b) Title 26 USC §7602 requires CIR to obtain records by process. Fourth Amendment to the Constitution protects citizens from improper seizure. In Hinchcliffe v. Clarke (1963) 230 F Supp 91, 64-2 USTC 93, 259 CIR obtained taxpayer's records without following 26 USC § 7605. Court prohibited their use in any way whatsoever.

6. THE CIR'S CASE DEPENDED UPON NET WORTH; IT IS NOT AVAILABLE

The deficiency notice advises

"In the absence of adequate records, your taxable income has been computed upon...net worth..." (I R 44)

Since the basis of the "absence" was "no return filed" (I R 45, 48, 51, 57, 60) the CIR has no right to proceed on the net worth system after admitting filing and failing to produce records.

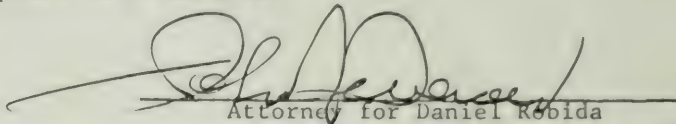
7. ALL YEARS ARE NOW BARRED

Section 6212 (c)(1) of the Internal Revenue Code of 1954 provides that the Commissioner cannot determine additional deficiencies after the taxpayer files a petition with the Tax Court.

A second notice is invalid if sent after the period of assessment. Rudd Mfg. Co. 15 TC 374. The statute has now run.

new notice will be valid.

WHEREFORE Petitioner respectfully urges that this Court now
ify its decision either to direct judgment for Petitioner or to make
h findings and directions as will give to Petitioner proper protection
to the matters herein set forth. It would now be unjust to require
itioner to go to the expense of a new trial.


Attorney for Daniel Robida

Affidavit of Service by Mail

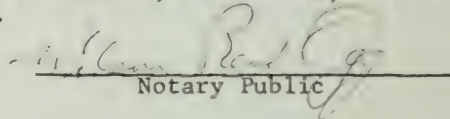
JOHN R. SWENDSEN, being first duly sworn, deposes and says:

I am a citizen of the United States, over the age of 21 and not a
erty to the within proceeding.

On February 17, 1967, I served the foregoing Petition for Rehearing
the Honorable Mitchell Rogovin, Assistant Attorney General, by depositi
copy thereof, airmail postage prepaid, in the United States Mail, address
him as follows:

Honorable Mitchell Rogovin
Assistant Attorney General
U.S. Department of Justice
Washington, D.C. 20530

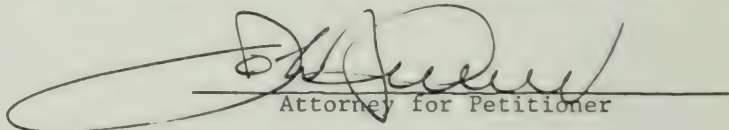
SUBSCRIBED and sworn to before me at San Francisco, California, this 17
y of February, 1967, by JOHN R. SWENDSEN.


Notary Public

My Commission expires:
March 24, 1968.

Certificate of Counsel

I certify that in my judgment this Petition is well founded and not
erposed for delay.


Attorney for Petitioner



